Supreme Court, U.S.
FILED

94 692 SEP 28 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

ERIC ANTONIO PARKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD S. STAFMAN
Counsel of Record for Petitioner
6950 Bradfordville Road
Tallahassee, Florida 32308-1804
(904) 681-7830

WILLIAM D. MASSEY
Counsel for Petitioner
100 N. Main, Suite 3010
Memphis, Tennessee 38103
(901) 525-4357

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

96 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the government should be allowed to present overwhelming amounts of uncharged misconduct evidence to establish intent when intent is not a disputed issue at trial due to the defendant's general denial of the act charged?

2. Whether an unequivocal offer of stipulation or concession serves to remove intent as an issue at trial, such that the government should be prohibited from presenting evidence on that issue?

3. Whether an unequivocal offer of stipulation should be one factor considered in the Rule 403 balancing when deciding whether to admit evidence of uncharged misconduct?

4. Whether the amount of 404(b) evidence properly admitted should be a factor considered in the Rule 403 balancing analysis mandated by Rule 404?

5. Whether evidence of a separate conspiracy was properly admitted as substantive proof of the charged conspiracy?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

FEDERAL PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE 2

Background 4

Extrinsic Crimes..... 6

REASONS RELIED UPON FOR GRANTING THE WRIT OF CERTIORARI..... 7

1. This Court should resolve a split in authority between the United States Courts of Appeals in determining whether the government should be allowed to present evidence of uncharged misconduct to prove intent when the defendant generally denies the charge so that intent is not a disputed issue at trial 7

Application of the issue in the instant case..... 7

Split in the Circuits 8

Analysis 10

TABLE OF CONTENTS – Continued

Page

2. This Court should resolve a split in authority between the United States Courts of Appeals concerning whether an unequivocal offer of stipulation or concession serves to remove intent as an issue at trial, such that the government should be prohibited from presenting evidence on that issue 14

Application of the issue in the instant case 14

Split in the Circuits 15

Analysis 20

3. This Court should resolve the split in the United States Courts of Appeals and determine whether a proffered stipulation should be a factor considered under the Rule 403 balancing test necessary to Rule 404(b) analysis 22

Application of this issue in the instant case 22

Split in the Circuits 23

Analysis 25

4. This Court should resolve the split in the Courts of Appeals and determine whether the amount of 404(b) evidence admitted weighs upon the Rule 403 analysis 26

Application of this issue in the instant case 26

Split in the Circuits 26

Analysis 27

TABLE OF CONTENTS – Continued

Page

5. This court should reverse the decision of the United States Court of Appeals for the Eleventh Circuit affirming the trial court's admission of evidence of a separate conspiracy as substantive evidence, since, pursuant to Supreme Court Rule 10.1(a), such a departure from the usual course of judicial proceedings calls for an exercise of this Court's power of supervision 28

Application in the instant case 28

Analysis 29

CONCLUSION 30

APPENDIX A, *United States v. Parker* 19 F.3d 638 (11th Cir. 1994) 1a

APPENDIX B, Denial of Rehearing by Eleventh Circuit Court of Appeals 1b

APPENDIX C, District Court Opinion 1c

APPENDIX D, Indictment 1d

APPENDIX E, Excerpt from pre-trial motion regarding 404(b) evidence 1e

APPENDIX F, Excerpt from Shirelle Merit's testimony 1f

TABLE OF AUTHORITIES

Page

CASES

Blumenthal v. United States, 332 U.S. 539 (1947) 29

Huddleston v. United States, 485 U.S. 681 (1988) ...11, 23

Kotteakos v. United States, 328 U.S. 750 (1946) 29

Michelson v. United States, 335 U.S. 469 (1948) 23

People v. Allen, 420 N.W. 2d 499 (1988) 21

People v. Molineux, 61 N.E. 286 (1901) 11

United States v. Burkett, 821 F.2d 1306 (8th Cir. 1987) 9

United States v. Cardenas, 895 F.2d 1338 (11th Cir. 1990) 9, 19, 22

United States v. Castro, 829 F.2d 1038 (11th Cir. 1987) 30

United States v. Chaimson, 760 F.2d 798 (7th Cir. 1985) 9

United States v. Colon, 880 F.2d 650 (2d Cir. 1989) 10, 17, 23

United States v. Costa, 947 F.2d 919 (11th Cir. 1991) ..9, 19

United States v. Daniels, 770 F.2d 1111 (D.C. Cir. 1985) 10

United States v. Davis, 792 F.2d 1305 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986) 21, 22

United States v. Diaz-Lizaraza, 981 F.2d 1216 (11th Cir. 1993) 9, 19

United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989) 29

TABLE OF AUTHORITIES – Continued

Page

United States v. Ferrer-Cruz, 899 F.2d 135 (1st Cir. 1990) 9, 16, 24

United States v. Figueroa, 618 F.2d 934 (2d Cir. 1980) 10, 16, 17, 20, 23, 25

United States v. Fortenberry, 860 F.2d 628 (5th Cir. 1988) 27

United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983) 9

United States v. Garcia, 983 F.2d 1160 (1st Cir. 1993) 9, 16, 17, 21, 24

United States v. Gilmore, 730 F.2d 550 (8th Cir. 1984) 9

United States v. Hadley, 918 F.2d 848 (9th Cir. 1990) ..9, 11

United States v. Hernandez, 975 F.2d 1035 (4th Cir. 1992) 10, 13

United States v. Hernandez, 896 F.2d 513 (11th Cir. 1990) 9

United States v. Jemal, 26 F.3d 1267 (3d Cir. 1994) 10, 13, 17, 18, 23, 24

United States v. Jenkins, 7 F.3d 803 (8th Cir. 1993) 9

United States v. Johnson, 27 F.3d 1186 (6th Cir. 1994) 9

United States v. Jones, 570 F.2d 765 (8th Cir. 1978) 27

United States v. Jones, 913 F.2d 1552 (11th Cir. 1990) 9

United States v. Manafzadeh, 592 F.2d 81 (2d Cir. 1979) 10, 17, 23

United States v. Manner, 887 F.2d 317 (D.C. Cir. 1989) 9, 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Mazzanti, 888 F.2d 1165 (7th Cir. 1989) 9

United States v. Miller, 974 F.2d 953 (8th Cir. 1992) 9, 18, 21, 24

United States v. Moccia, 681 F.2d 61 (1st Cir. 1982) 13

United States v. Mohel, 604 F.2d 748 (2d Cir. 1979) 10, 17, 20, 23

United States v. Mullins, 954 F.2d 1471 (9th Cir. 1991) 15

United States v. Myers, 550 F.2d 1036 (5th Cir. 1977) 10

United States v. O'Connor, 580 F.2d 38 (2d Cir. 1978) 10, 17, 23

United States v. Oppon, 863 F.2d 141 (1st Cir. 1988) 10

United States v. Ortiz, 857 F.2d 900 (2d Cir. 1988), *cert. denied*, 489 U.S. 1070 (1989) 10, 17, 23

United States v. Palmer, 990 F.2d 490 (9th Cir. 1993) 9

United States v. Parker, 997 F.2d 219 (6th Cir. 1993) 7

United States v. Parker, 19 F.3d 638 (11th Cir. 1994) ..... *passim*

United States v. Peltier, 585 F.2d 314 (1979) 19

United States v. Ponce, 8 F.3d 989 (5th Cir. 1992) 18, 21, 24, 27, 28

United States v. Provenzano, 620 F.2d 985 (3d Cir. 1980) 24

United States v. Rhodes, 779 F.2d 1019 (4th Cir. 1985) 16

TABLE OF AUTHORITIES – Continued

Page

United States v. Rivera-Sola, 713 F.2d 866 (1st Cir. 1983) 9

United States v. Roberts, 619 F.2d 379 (5th Cir. 1980) 9

United States v. Russo, 717 F.2d 545 (11th Cir. 1983) ..9, 19

United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980) 9, 21

United States v. Sampson, 480 F.2d 883 (3d Cir. 1992) 23

United States v. Sheeran, 699 F.2d 112 (3d Cir. 1983) 24

United States v. Sheperd, 739 F.2d 510 (10th Cir. 1984) 27

United States v. Silva, 580 F.2d 144 (5th Cir. 1978) 9

United States v. Simon, 842 F.2d 552 (1st Cir. 1988) 13

United States v. Soundingsides, 820 F.2d 1232 (10th Cir. 1987) 9

United States v. Suntar Roofing, Inc., 897 F.2d 469 (10th Cir. 1990) 9

United States v. Tarricone, 996 F.2d 1414 (2d Cir. 1993) 20

United States v. Taylor, 17 F.3d 333 (11th Cir. 1994) ... 19, 24

United States v. Terry, 702 F.2d 299 (2d Cir.), cert. denied sub nom. *Williams v. United States*, 461 U.S. 931 (1983) 13

United States v. Yeagin, 927 F.2d 798 (5th Cir. 1991) 18, 21, 22, 27, 28

United States v. Yellow, 18 F.3d 1438 (8th Cir. 1994) 9

TABLE OF AUTHORITIES – Continued

Page

RULES

Rules 403 and 404, *Federal Rules of Evidence* ..... *passim*

MISCELLANEOUS

The Advisory Committee Notes to the 1972 Rule 403 25

The Advisory Committee Notes to the 1972 and 1991 Rule 404 25

Hadley v. United States, Petitioner's Brief, 1991 WL 526212 at *27 12

Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. Law Review 1003, 1059 (1984) 10

Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 Cin. L. Rev. 713 (1981) 11

S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* 43 (2d ed. 1978 Supp.) 25

Summers, *Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions*, 36 Tenn. L. Rev. 515, 518 (1969) 12

Wright & Graham, *Federal Practice & Procedure: Evidence* (1978) 12, 25, 27

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Eric Antonio Parker, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which denied the timely petition for rehearing in this matter on June 30, 1994.

OPINION BELOW

On April 27, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the convictions of the Petitioner for one count of conspiracy and one count possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 846 and § 841. The decision of the Eleventh Circuit is reported at 19 F.3d 638 (11th Cir. 1993), and a copy of the decision is included with this petition as Appendix A. The Petitioner's timely Petition for Rehearing under Fed. R. App. P. 40, and Suggestion for Rehearing En Banc under Fed. R. App. P. 35 were denied on June 30, 1994. A copy of the Order denying the Petition for Rehearing in the Court of Appeals is included as Appendix B.

JURISDICTION

The order of the Court of Appeals for the Eleventh Circuit denying Mr. Parker's Petition for Rehearing was entered on June 30, 1994. This Petition for Writ of Certiorari is filed within ninety days of that date, pursuant to Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

Federal Rules of Evidence 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

> **(1) Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> **(2) Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> **(3) Character of a witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excused pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

Mr. Parker was charged with conspiracy to distribute more than 50 grams of crack cocaine and two substantive counts alleging possession crack cocaine with the intent to

distribute. A.D.[1] At his first trial in May, 1992, the trial court admitted evidence of one prior bad act in Memphis, Tennessee. Mr. Parker was acquitted of one substantive count, but the jury could not reach a verdict on Counts I and III. A mistrial was declared as to those two charges.

Mr. Parker was retried on Counts I and III. The government again introduced evidence of prior drug activity in Memphis. This time, however, the government buttressed its case by introducing evidence of two separate encounters by Mr. Parker with law enforcement in Texas some years earlier and two alleged drug deals in South Carolina.[2] With this new evidence, ostensibly offered to show "intent" under Federal Rule of Evidence 404(b), Mr. Parker was convicted of both counts and was sentenced to life in prison. A.C.

On appeal, the panel affirmed. The panel did not address the propriety of the government's extensive use of the Rule 404(b) evidence, save to reject the argument in a footnote. *United States v. Parker*, 19 F.3d 638 (11th Cir. 1994).

At Mr. Parker's second trial, overwhelming evidence of prior uncharged acts was admitted, ostensibly on the issue of intent. However, it is Mr. Parker's position that he never disputed the issue of intent; he claimed he had nothing to do with the drug deals in question. He never strayed from this defense. The difference between the first trial, which ended in an acquittal as to one count and a hung jury as to the other two counts, and the second trial, which ended in conviction, can only be explained by the introduction of overwhelming evidence of Mr. Parker's prior uncharged acts. The admission of this extrinsic evidence must thus be judged carefully because if it was inadmissible, Mr. Parker's conviction and corresponding life sentence are a miscarriage of justice.

---

[1] "A.D" refers to Appendix D.

[2] The government sought to introduce similar evidence in the first trial, but the court ruled it inadmissible.

Background

The case against Mr. Parker began on December 9, 1988 when Katrina Lymon departed Miami for Tallahassee via Atlanta carrying about 700 grams of cocaine. While changing planes in Atlanta, she was detained and arrested. She agreed to cooperate and to make a controlled delivery of the cocaine in Tallahassee.

Once in Tallahassee, she followed her original plan by proceeding to a motel, where she made some calls, one to a beeper number she had been given. Thereafter, Lymon's boyfriend, Carl E. Gray, together with Carl Ellerby, arrived at Lymon's motel room to pick up the drugs, and were arrested.

Lymon had told all involved on numerous occasions – both before and after the controlled buy – that she had been provided the drugs by man named "Jimbo", and she never mentioned the name or identified a photograph of Mr. Parker, despite extensive interviews and debriefings. She pled guilty to a drug conspiracy four months later and was sentenced to ten (10) years in prison. She later testified at the trial of Gray, again repeating that the supplier of the drugs was "Jimbo". No mention was made of Mr. Parker at that trial.

Following her testimony in the Gray trial, Lymon was moved to another jail facility and was upset about the loss of her freedom. About four (4) months later, in July of 1989, she agreed to be a government witness against Mr. Parker and the government filed a Rule 35 motion on her behalf. Lymon then testified that she had been given the drugs and the beeper number by Mr. Parker,[3] and said that she had been dishonest in her various briefings with various agents and that she lied under oath at the trial of her lover, Carl Gray, and at suppression hearing in her own case.

Other evidence suggesting Mr. Parker's involvement consisted of the following: 1) a rental car agreement showing Mr. Parker as the lessee name found in the glove compartment of

---

[3] Lymon said that she met Mr. Parker through Gray and that at their first meeting, Mr. Parker asked her to transport 700 grams of cocaine worth a large sum of money to Tallahassee.

the car being driven by Gray and Ellerby to Tallahassee; 2) several telephone calls made from an apartment where Mr. Parker (along with at least on other person) was on the lease, to the motel in Tallahassee on the day in question; 3) Gray and Lymon each had a slip of paper containing a beeper number alongside the letter "E"; 4) one witness testified that Mr. Parker had previously been called "Easy E"; and 5) the immunized testimony of Shirelle Merit.

All of this evidence, however is easily explained. Mr. Parker's association with Gray is not surprising because Mr. Parker is Gray's nephew. Thus, although the car that Gray and Ellerby were driving was rented in Mr. Parker's name, we do not know if that was done because of Mr. Parker's access to a credit card or simply because the two men were related and Mr. Parker had rented the car for Mr. Gray.

Similarly, the two telephone calls which may or may not have been made by Mr. Parker did not correspond in number or time of day to the three telephone calls to Lymon at the Tallahassee motel. Moreover, even if Mr. Parker had called the motel, he may have been seeking to speak with his uncle.

Finally, although the beeper numbers (which, absent Lymon's testimony, were not tied in any way to Mr. Parker) were associated with the letter "E" and although one witness, through 404(b) proof, testified that Mr. Parker had previously been called Easy E, it is also true that the men who picked up the drugs were named Carl ***E***. Gray and Carl ***E***llerby. We do not know the street names of these two men, nor do we know how many other individuals might be colloquially called "E".

At the close of the second trial, a total of seven (7) witnesses testified to all of the above, which included a fingerprint expert and a chemist, neither of whom implicated Mr. Parker. An additional eight (8) witnesses testified to extrinsic crimes allegedly committed by Mr. Parker, despite Mr. Parker's motion in limine to exclude the information, his failure to put intent in issue, and his offer to stipulate to his intent, which was the purpose for which the evidence was purportedly offered. Nevertheless, the district court admitted this evidence, part of which had not been admitted at the first trial.

Extrinsic Crimes

(a) *The First Houston Incident.* James Krol, a police officer from Houston, Texas, testified that in January, 1985, in Houston, he stopped a car for speeding in which Mr. Parker was a passenger. Krol testified that Mr. Parker had two thousand three hundred dollars ($2,300) in his possession at that time, as well as a small package of marijuana and some cocaine in an envelope.

(b) *The Second Houston Incident.* Houston police officers DeBlanc, McFadin, and Thraikill each testified that they had a previous encounter with Mr. Parker about five (5) years earlier. DeBlanc approached Mr. Parker who directed him to anther person for the purpose of buying twenty-five dollars ($25) worth of cocaine. Mr. Parker stood about thirty (30) feet away as DeBlanc purchased cocaine from this third person. The seller and Mr. Parker were each later found to have in their possession some of the money that was used to make the buy. McFadin testified that at the time of Mr. Parker's arrest, he had in his possession two thousand three hundred eighty seven dollars ($2,387). Thraikill arrested the third person who sold the drugs.

(c) *The South Carolina Incidents.* Approximately a week before Mr. Parker's retrial, Lymon told the government that her friend – Shirelle Merit – may have knowledge of Mr. Parker's involvement in drugs. Merit, who had been given immunity for her testimony, testified that she transported drugs to South Carolina and upon arrival, she had gone to a hotel, telephoned Lymon, and then dialed a beeper number. She said that "E" then called her back and someone then arrived to pick up the drugs. She testified that he could not identify "E", that she did not recognize him, and that she could not identify him in court.[4]

In addition, a South Carolina narcotics investigator also testified that he knew of Mr. Parker, and that his nickname

---

[4] The district court admitted Merit's testimony under Rule 404(b), as well as proof of this conspiracy.

was "E". This testimony branded Mr. Parker as someone with whom South Carolina narcotics investigators were familiar.

(d) *The Memphis Incident*. Reginald Drake and Brian Chambers investigated Mr. Parker in Memphis, Tennessee, in 1990. Mr. Parker was later arrested, tried by a jury, and convicted of a drug conspiracy and one substantive count in federal court in Memphis. He was sentenced to life in prison, but these convictions have now been reversed. *U.S. v. Parker*, 997 F.2d 219 (6th Cir. 1993). Over Mr. Parker's contention that his prior statements had been immunized, Drake testified that during the course of his investigation, Mr. Parker told him that he had brought drugs into Memphis on two or three occasions via women who were traveling on flights to Memphis and carried the drugs for him. The drugs would then be taken to a hotel and the buyer would come to the hotel.[5]

REASONS RELIED UPON FOR GRANTING THE WRIT OF CERTIORARI

1. This Court should resolve a split in authority between the United States Courts of Appeals in determining whether the government should be allowed to present evidence of uncharged misconduct to prove intent when the defendant generally denies the act charged so that intent is not a disputed issue at trial.

Application of the issue in the instant case

Prior to the first trial, the government announced its intent to rely upon evidence of other crimes. Specifically, the government intended to rely upon facts surrounding a Memphis, Tennessee, drug conspiracy for which Mr. Parker had been convicted, and a Charleston, South Carolina, incident in which Mr. Parker was arrested for allegedly trafficking in cocaine. At a hearing on Mr. Parker's motion in limine, the

---

[5] Unlike the other Rule 404 testimony, the testimony of Reginald Drake had been admitted in Defendant's first trial.

district court ruled the Memphis incident admissible as extrinsic offense evidence, but expressed doubts about the admissibility of the Charleston incident. Later, during the course of the first trial, when the government sought to introduce testimony concerning the Charleston incident, the district court ruled it was irrelevant and therefore inadmissible.

Prior to the second trial, the government filed an amended notice of intent to introduce evidence of other wrongs, deleting the Charleston incident, but adding two (2) Houston, Texas, incidents, where Mr. Parker allegedly possessed drugs. The defense filed a corresponding motion in limine regarding the admissibility of the other acts evidence. As in the first trial, Mr. Parker's sole defense was that he was never in possession, actually, constructively, or otherwise, and that he was not involved in the drug deal at all. Specifically, defense counsel stated:

> [I]t's the position of the defense that the transaction described did not take place at all. It's not a question of whether Mr. Parker had intent, it's not a question of whether there was a mistake. Those are not even issues in this case. It's the position of the defense that the government is – is simply trying to illicit [sic] from an admitted perjurer evidence of a transaction which in fact never took place. See A.E, 10e.

Since the Eleventh Circuit follows the rule that intent is always an issue in conspiracy prosecutions, the district court ruled the extrinsic acts admissible to prove intent. See A.E, 19-20. On appeal, the Eleventh Circuit dismissed this issue in a footnote. *Parker*, 19 F.3d at 638, n.1. (See A.A)

The Split in the Circuits

In deciding this issue, many of the United States Courts of Appeals draw a distinction between general and specific intent crimes. The Sixth, Seventh, Eighth, Ninth and Tenth Circuits hold that if the defendant is charged with a general intent crime and he denies the act, no issue of intent has been raised. However, if the charge is a specific intent crime,

regardless of the defendant's position, intent is automatically an issue and thus can be proven by extrinsic acts.[6] *United States v. Johnson*, 27 F.3d 1186 (6th Cir. 1994); *United States v. Mazzanti*, 888 F.2d 1165 (7th Cir. 1989); *United States v. Chaimson*, 760 F.2d 798 (7th Cir. 1985); *United States v. Yellow*, 18 F.3d 1438 (8th Cir. 1994); *United States v. Miller*, 974 F.2d 953 (8th Cir. 1992); *United States v. Gilmore*, 730 F.2d 550 (8th Cir. 1984); *United States v. Jenkins*, 7 F.3d 803 (8th Cir. 1993); *United States v. Burkett*, 821 F.2d 1306 (8th Cir. 1987); *United States v. Palmer*, 990 F.2d 490 (9th Cir. 1993); *United States v. Hadley*, 918 F.2d 848 (9th Cir. 1990); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469 (10th Cir. 1990); *United States v. Soundingsides*, 820 F.2d 1232 (10th Cir. 1987); *United States v. Franklin*, 704 F.2d 1183 (10th Cir. 1983).

Some circuits provide a special rule for conspiracy cases. The Fifth, Eleventh, and District of Columbia Circuits afford conspiracy cases special treatment because the intent to conspire is often quite difficult to prove. Thus, intent is always an issue in conspiracy cases. *United States v. Roberts*, 619 F.2d 379 (5th Cir. 1980); *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978); *United States v. Russo*, 717 F.2d 545 (11th Cir. 1983); *United States v. Costa*, 947 F.2d 919 (11th Cir. 1991); *United States v. Jones*, 913 F.2d 1552 (11th Cir. 1990); *United States v. Diaz-Lizaraza*, 981 F.2d 1216 (11th Cir. 1993); *United States v. Hernandez*, 896 F.2d 513 (11th Cir. 1990); *United States v. Cardenas*, 895 F.2d 1338 (11th Cir. 1990); *United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980); *United States v. Manner*, 887 F.2d 317 (D.C. Cir. 1989).

The First Circuit is the only circuit to hold that in all cases, specific and general intent crimes alike, intent is always an issue. *United States v. Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983); *United States v. Ferrer-Cruz*, 899 F.2d 135 (1st Cir. 1990); *United States v. Garcia*, 983 F.2d 1160 (1st

---

[6] Admissibility is subject to other criteria also, i.e. reliability, proximity of time, necessity, and Rule 403 balancing.

Cir. 1993); *United States v. Oppon*, 863 F.2d 141 (1st Cir. 1988).

Conversely, the Second Circuit is the only Court of Appeal to hold that a general denial negates intent as an issue in all cases, even those involving specific intent crimes. *United States v. Colon*, 880 F.2d 650 (2d Cir. 1989); *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988), *cert. denied*, 489 U.S. 1070 (1989); *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980); *United States v. Mohel*, 604 F.2d 748 (2d Cir. 1979); *United States v. Manafzadeh*, 592 F.2d 81 (2d Cir. 1979); *United States v. O'Connor*, 580 F.2d 38 (2d Cir. 1978).

The Third and Fourth Circuits have engaged in more analysis than the other courts. They have each advocated a "case by case" approach whereby the relevance, probative value and prejudice are examined in light of the defense asserted. Both courts have noted that the probative value of extrinsic acts offered to prove intent is significantly less when the defendant raises no issue of intent. *United States v. Jemal*, 26 F.3d 1267 (3d Cir. 1994); *United States v. Hernandez*, 975 F.2d 1035 (4th Cir. 1992).

Analysis

The exclusion of character evidence "gives meaning to the central precept of our system of criminal justice, the presumption of innocence." *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985). This presumption mandates that "a defendant must be tried for what he did, not for who he is." *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977). The theory is that admission of prior bad acts could result in innocent defendants being convicted solely because jurors would conclude that since the defendant has sinned before, he has likely sinned again. Furthermore, empirical research "appears to confirm the law's concern that such evidence carries undeserved weight." Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. Law Review 1003, 1059 (1984). For these reasons, unless there is

a legitimate, necessary issue upon which to admit prior acts, Rule 404(b) prohibits their introduction.

This Court recently examined the issue of what test must be satisfied before 404(b) evidence may be properly admitted. First, the evidence must be offered for a relevant purpose other than the defendant's bad character. Second, the evidence must actually be relevant to this purpose. In addition, the probative value of the evidence must outweigh its prejudicial effect. *Huddleston v. United States*, 485 U.S. 681, 685, 691-92 (1988). However, the court did not explore the instant question of whether issues become irrelevant in light of a defendant's theory of defense.[7]

In addressing this issue, the Second Circuit has most closely catered to the original intent of the rule against the admissibility of character evidence. The genesis of this rule dates back to 1695. England's Treason Act prohibited acts not charged in the indictment from being proven at trial. See, Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 Cin. L. Rev. 713 (1981). This rule first appeared in the United States in *People v. Molineux*, 61 N.E. 286, 294-310 (1901). The defendant was charged with intentional killing through the use of poison. The court held that the prosecution could use evidence of other criminal acts only if the defendant raised the issues of accident or mistake. *Id.* at 298-99. This rule, the one followed by the Second Circuit today, makes the most sense. If a defendant has claimed that he lacked the required intent, it is logical that the prosecution be allowed to show evidence of other crimes to demonstrate that intent. However, if the defendant claims that he was not there, that he did not do it, or that he is the wrong person, no issue of intent has been raised, and if the act is proved, the intent will be inferred.

Illustrative of this concept is the Ninth Circuit case of *United States v. Hadley*, 918 F.2d 848 (9th Cir. 1990) The

---

[7] The instant case, however, properly presents this issue. Mr. Parker never disputed the issue of intent. Through two trials, his sole defense was a general denial of the crimes charged. He repeatedly stated that intent was not, and would never be an issue. He further offered to stipulate to the issue of intent.

defendant, Hadley, was charged with aggravated sexual abuse and abusive sexual contact. Although the sole defense asserted was a denial of the charges, the court admitted extrinsic evidence of prior alleged acts of sexual involvement with children, ostensibly for the purpose of proving intent. The Ninth Circuit admitted the evidence on the issue of intent, holding that, regardless of the defense asserted, the prosecution was still required to prove intent, therefore intent was an issue. However, in his brief to this Court on a similar issue, the defendant argued that if the prosecution proves the act, intent will automatically follow. "It is simply impossible to argue with a straight face that Verl Hadley could attempt to insert his penis into the anal opening of a young boy for some purpose other than sexual gratification." *Hadley v. United States*, Petitioner's Brief, 1991 WL 526212 at *27. Similarly, "it is difficult to imagine how a printer could accidentally or mistakenly produce counterfeit twenty dollar bills." Wright & Graham, *Federal Practice & Procedure: Evidence*, § 5247 (1978).

The instant case presents the same situation. The amount of cocaine involved in the drug transaction attributed to Mr. Parker was so large that the defense could not possibly have argued that the cocaine was for personal use.[8] Further, the operation described at trial was obviously a drug trafficking operation, involving the distribution of cocaine. If the mechanics of the drug transaction were linked to Mr. Parker, intent to distribute must logically follow. It is true that intent is an element of these crimes, but the issues are illusory. Once the acts are proven, the issue of intent simply disappears. It is inferred of logic and necessity. If this is so, then the evidence can not truly be said to be admitted for the purpose of proving intent because intent does not need to be proven. The acts are only being admitted as impermissible character evidence. See Summers, *Admissibility of Prior Criminal Acts as Substantive*

---

[8] Again, it should be noted that Mr. Parker, in fact, never made such an assertion. He simply said that he did not commit the crimes charged.

Evidence in Criminal Prosecutions, 36 Tenn. L. Rev. 515, 518 (1969).

Contrast the above examples with cases where intent, or some other relevant element, is truly in issue. In *United States v. Simon*, 842 F.2d 552, 553-55 (1st Cir. 1988), the court admitted a prior marijuana conviction to rebut defendant's contention that he thought a package he carried contained books, not marijuana. In *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982), the defendant claimed that he did not know that marijuana was growing on his farm, so the court admitted a similar prior conviction to show his lack of innocent intent. Similarly, in *United States v. Terry*, 702 F.2d 299, 316 (2d Cir.), *cert. denied sub nom. Williams v. United States*, 461 U.S. 931 (1983), the court admitted a past narcotics conviction to prove intent when the defendant claimed that certain telephone conversations related, not to drugs, but to gambling.

The Third and Fourth Circuits also take realistic approaches to the issue at hand. The Third Circuit holds that "[t]he relevance of . . . prior bad acts evidence will be minimal [where a defendant makes clear he is not contesting an issue], since the evidence will not bear on the issues being contested."[9] *Jemal*, 26 F.3d at 1274. In addition, when such evidence is subjected to Rule 403 balancing, undue prejudice to the defendant "will be quite high, since prior bad acts evidence tends to be quite persuasive." *Id.* Accordingly, the Third Circuit has held that "district courts should generally deem prior bad acts evidence inadmissible to prove an issue that the defendant makes clear he is not contesting." *Id.*

The Fourth Circuit has adopted a test examining the relevance, necessity and reliability of the evidence sought to be introduced. In addition, the court employs the balancing

---

[9] Again, note that the fact that Mr. Parker was not contesting the issue of intent could not have been any clearer. The prosecution knew from the first trial exactly what Mr. Parker's defense was: that he was not involved in the drug operation charged. Mr. Parker's counsel stated emphatically that intent would not be a disputed issue, and even offered to concede the issue should the accompanying acts be proven.

test of Rule 403. In applying this test, the court indicates that uncharged acts are not always inadmissible on the issue of intent simply because a defendant generally denies a charge. However, the court did point out in *United States v. Hernandez*, 975 F.2d 1035 (4th Cir. 1992), that the defendant "offered as her defense the contention that she had not sold the crack in question. . . . She did not testify that she had in some way sold or handled the crack but without the requisite knowledge or intent; nor did she testify that she had never touched crack or did not know what it was." The *Hernandez* court then noted that "[m]ost crimes involve some level of intent, but all evidence of other intentional acts or crimes does not for this reason become relevant. *Id.* at 1039. Although no definitive rule was established, the court did engage in thoughtful, fact-specific analysis, taking into account the nature of the defense asserted. The result was the exclusion of the other acts evidence.

The Second, Third, and Fourth Circuits have analyzed this issue more thoroughly than have the other circuits. It is quite easy to draw a bright line between general and specific intent crimes and mechanically admit or exclude evidence on this basis. It is far more difficult and time-consuming to think through the reasons behind Rule 404, keeping in mind the enormous prejudicial potential of this kind of evidence, and determine whether or not this evidence bears on an actual issue in controversy. However, given the dangerous weight juries afford prior bad acts, and the nature of what is at stake for the defendant, his freedom and sometimes his life, this analysis is imperative.

2. This Court should resolve a split in authority between the United States Courts of Appeals concerning whether an unequivocal offer of stipulation or concession serves to remove intent as an issue at trial, such that the government should be prohibited from presenting evidence on that issue.

Application of the issue in the instant case

Before trial, Mr. Parker clearly and unequivocally offered to stipulate to intent and remove it from consideration as an

issue. Counsel for Mr. Parker specifically stated, "[I]f the jury finds beyond a reasonable doubt that Katrina Lymon received the cocaine in issue from Eric Parker, and if Eric Parker paid Katrina Lymon to fly it to Tallahassee, then that would establish intent to deliver."[10] However, the district court was unwilling to accept the stipulation unless Mr. Parker's counsel was willing

> to stand up in front of the jury at the beginning of the trial and say my client and I announce to the – to the court and to the jury that we intended to – to distribute cocaine, we intended to conspire with Katrina Lymon and Carl Gray to distribute. See A.E, 14.

On appeal, the Eleventh Circuit dismissed this issue in a footnote. *Parker*, 19 F.3d at 638, n.1. (See A.A)

The Split in the Circuits

The United States Courts of Appeals opinions on this issue are, at best, unclear. The Circuits are split over the content of a proper stipulation, and whether a judge is required to accept an offer of stipulation.

The First, Second, Third, Fifth, Eighth and Eleventh Circuits have all examined this issue.[11] The courts all agree that, to be admitted, 404(b) evidence must be relevant to a material issue, and pass the Rule 403 balancing test. Almost universally, the courts cite a test from a Second Circuit case to measure the validity of a proposed stipulation. In the

---

[10] See A.E, 13e. Defense counsel had access to the transcript of the first trial and thus knew that the government's proof consisted of Lymon's testimony that she received the cocaine from Mr. Parker and that he paid her for the delivery to Tallahassee. This explains the specific verbage used by defense counsel in the proffered stipulation.

[11] The other circuits have noted that stipulations would affect the issue of the admissibility of 404(b) evidence. However, the case law has not developed to the point of providing a clear position on the issue. *United States v. Manner*, 887 F.2d 317 D.C. Cir. 1989); *United States v. Mullins*, 954 F.2d 720 (4th Cir. 1992); *United States v. Grady*, 925 F.2d 1471 (9th Cir. 1991); *United States v. Fleming*, 983 F.2d 1058 (4th Cir. 1993).

test of Rule 403. In applying this test, the court indicates that uncharged acts are not always inadmissible on the issue of intent simply because a defendant generally denies a charge. However, the court did point out in *United States v. Hernandez*, 975 F.2d 1035 (4th Cir. 1992), that the defendant "offered as her defense the contention that she had not sold the crack in question. . . . She did not testify that she had in some way sold or handled the crack but without the requisite knowledge or intent; nor did she testify that she had never touched crack or did not know what it was." The *Hernandez* court then noted that "[m]ost crimes involve some level of intent, but all evidence of other intentional acts or crimes does not for this reason become relevant. *Id.* at 1039. Although no definitive rule was established, the court did engage in thoughtful, fact-specific analysis, taking into account the nature of the defense asserted. The result was the exclusion of the other acts evidence.

The Second, Third, and Fourth Circuits have analyzed this issue more thoroughly than have the other circuits. It is quite easy to draw a bright line between general and specific intent crimes and mechanically admit or exclude evidence on this basis. It is far more difficult and time-consuming to think through the reasons behind Rule 404, keeping in mind the enormous prejudicial potential of this kind of evidence, and determine whether or not this evidence bears on an actual issue in controversy. However, given the dangerous weight juries afford prior bad acts, and the nature of what is at stake for the defendant, his freedom and sometimes his life, this analysis is imperative.

2. This Court should resolve a split in authority between the United States Courts of Appeals concerning whether an unequivocal offer of stipulation or concession serves to remove intent as an issue at trial, such that the government should be prohibited from presenting evidence on that issue.

Application of the issue in the instant case

Before trial, Mr. Parker clearly and unequivocally offered to stipulate to intent and remove it from consideration as an

issue. Counsel for Mr. Parker specifically stated, "[I]f the jury finds beyond a reasonable doubt that Katrina Lymon received the cocaine in issue from Eric Parker, and if Eric Parker paid Katrina Lymon to fly it to Tallahassee, then that would establish intent to deliver."[10] However, the district court was unwilling to accept the stipulation unless Mr. Parker's counsel was willing

> to stand up in front of the jury at the beginning of the trial and say my client and I announce to the – to the court and to the jury that we intended to – to distribute cocaine, we intended to conspire with Katrina Lymon and Carl Gray to distribute. See A.E, 14.

On appeal, the Eleventh Circuit dismissed this issue in a footnote. *Parker*, 19 F.3d at 638, n.1. (See A.A)

The Split in the Circuits

The United States Courts of Appeals opinions on this issue are, at best, unclear. The Circuits are split over the content of a proper stipulation, and whether a judge is required to accept an offer of stipulation.

The First, Second, Third, Fifth, Eighth and Eleventh Circuits have all examined this issue.[11] The courts all agree that, to be admitted, 404(b) evidence must be relevant to a material issue, and pass the Rule 403 balancing test. Almost universally, the courts cite a test from a Second Circuit case to measure the validity of a proposed stipulation. In the

---

[10] See A.E, 13e. Defense counsel had access to the transcript of the first trial and thus knew that the government's proof consisted of Lymon's testimony that she received the cocaine from Mr. Parker and that he paid her for the delivery to Tallahassee. This explains the specific verbage used by defense counsel in the proffered stipulation.

[11] The other circuits have noted that stipulations would affect the issue of the admissibility of 404(b) evidence. However, the case law has not developed to the point of providing a clear position on the issue. *United States v. Manner*, 887 F.2d 317 D.C. Cir. 1989); *United States v. Mullins*, 954 F.2d 720 (4th Cir. 1992); *United States v. Grady*, 925 F.2d 1471 (9th Cir. 1991); *United States v. Fleming*, 983 F.2d 1058 (4th Cir. 1993).

United States v. Figueroa, 618 F.2d 934 (2d Cir. 1980), the Court of Appeals for the Second Circuit held that a defendant may remove an issue such as knowledge or intent by

> express[ing] a decision not to dispute that issue with sufficient clarity that the trial court will be justified (a) in sustaining objection to any subsequent cross-examination or jury argument that seeks to raise the issue and (b) in charging the jury that if they find all other elements established beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed.

Figueroa, 618 F.2d at 942. The Courts differ though in their application of this standard to 404(b) and in what they deem to be an adequate stipulation.

The First Circuit demands an offer to stipulate such that if the jury finds the defendant committed the act, then intent is admitted. The court has cited the *Figueroa* standard approvingly, and has found at least one defendant's stipulation to be sufficient to remove the issue of intent. In *United States v. Garcia*, 983 F.2d 1160 (1st Cir. 1993), the court stated that defense counsel's statement: ". . . if the jury finds beyond a reasonable doubt that [the defendant] possessed . . . cocaine, then I would stipulate that they can find . . . that he did so with the intention to distribute that cocaine." *Id.* at 1171.[12] Contrast this decision with the court's decision in *United States v. Ferrer-Cruz*, 899 F.2d 135 (1st Cir. 1990), where defense stated only that he would not argue "mere presence".[13] The court found no offer to stipulate and stated that defense counsel's statement was "quite different from saying that the judge may instruct the jury that, should it find

---

[12] However, the extrinsic acts were relevant on issues other than intent, therefore the court admitted the evidence for those purposes. *Id.* at 1175.

[13] The defense of "mere presence" arguably contests the issue of intent. Counsel is effectively arguing that the defendant was at the scene of the crime, but did not participate. Intent may be an issue in such a scenario. See *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985), where the court admitted prior acts because the defendant claimed "he was present but innocent" during a sale of drugs. *Id.* at 1030-31.

such presence, the defense will not dispute the . . . 'intent' needed to support conviction." *Id.* at 139.

In addition, the court in *Garcia*, stated that although "a serious offer to stipulate to issues of intent . . . should be explored by the district court . . . whether such an offer is accepted remains in the sound discretion of the district judge." 983 F.2d at 1175.

Second Circuit law holds that a defendant can remove an issue, such as intent, from a case by "mak[ing] some statement to the court of sufficient clarity to indicate that the issue will not be disputed." *United States v. Colon*, 880 F.2d 650, 659 (2d Cir. 1989). This may be accomplished by relying on a defense which does not dispute intent, stating unequivocally that intent will not be disputed, or stipulating to the issue.[14] Further, the court has definitively stated that if a stipulation or the general nature of the defense establishes that intent is not an issue, the extrinsic acts are not admissible to prove intent. Neither the prosecutor, nor the judge, has the discretion to refuse a valid offer to stipulate. *See Ortiz*, 857 F.2d 900, 904 (2d Cir. 1988).

The Third Circuit also follows the *Figueroa* model and states that "to succeed, the defendant's proffer must be comprehensive and unreserved, completely eliminating the government's need to prove the point it would otherwise try to establish using 404(b) evidence. In *United States v. Jemal*, 26 F.3d 1267 (3d Cir. 1994), the court upheld a district court's rejection of a stipulation offer because, with respect to some of the charged acts, defense counsel claimed that the defendant did the act but lacked the requisite intent. Given that position, no matter how sincere the offer to stipulate, the issue of intent would still be in dispute. Without taking the definitive stance of the Second Circuit, the court did state that "district courts should generally deem prior bad acts evidence

---

[14] *United States v. Colon*, 880 F.2d 650 (2d Cir. 1989); *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988), *cert. denied*, 489 U.S. 1070 (1989); *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980); *United States v. Mohel*, 604 F.2d 748 (2d Cir. 1979); *United States v. Manafzadeh*, 592 F.2d 81 (2d Cir. 1979); *United States v. O'Connor*, 580 F.2d 38 (2d Cir. 1978).

inadmissible to prove an issue that the defendant makes clear he is not contesting." *Jemal*, 26 F.3d 1267.

The Fifth Circuit has yet to define a proper stipulation. In *United States v. Yeagin*, 927 F.2d 798 (5th Cir. 1991), an offer to stipulate that the defendant had the requisite intent if the government proved possession of drugs, was sufficient to remove intent as an issue. However, in *United States v. Ponce*, 8 F.3d 989 (5th Cir. 1992), the court rejected defense counsel's offer to stipulate that if the jury finds defendant "was guilty of possession . . . we stipulate that he is also guilty of possession with intent to deliver." *Id.* at 993. Among other reasons why the stipulation offer was unacceptable, the court stated that defense counsel failed to clarify the above statement, so that the offer "was never precisely defined."[15]

Furthermore, the amount of judicial discretion involved in decisions concerning stipulation offers is unclear. *Ponce* construed *Yeagin* to be an exception to the general rule that "a party may not preclude his adversary's proof by an admission or offer to stipulate." However, the *Ponce* case was quite similar to *Yeagin*, so if *Ponce* did not fall within the exception, it is unclear what will. The *Ponce* decision apparently effectively disregarded *Yeagin* and revived the general rule against acceptance of stipulation offers.

The Eighth Circuit Court of Appeals found that the defense did not make a valid offer of stipulation when during argument at trial on the admissibility of other acts evidence, defense counsel stated, "we can enter into some type of agreement with the government that when we do present our case we will not claim such a defense [of intent]." *United States v. Miller*, 974 F.2d 953, 954 (8th Cir. 1992). The court made its decision in light of the fact that defense counsel's position at the pre-trial conference was that one defense would be "lack of specific intent". Defense counsel had further stated that "there are no stipulations, and there will be none." *Id.*

---

[15] The court also stated that unlike *Yeagin*, these acts were relevant to issues other than intent. In addition, Yeagin involved the admissibility of nine prior acts, while this case only concerned one. *Ponce*, 8 F.3d at 994.

The court also stated that "the government is not bound by the defendant's offer to stipulate." *Id.* (quoting *United States v. Peltier*, 585 F.2d 314, 324 (1979)).

The Eleventh Circuit has addressed this issue in *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994), where the court definitively stated, "where the defendant offers to stipulate to the issue the government seeks to prove, evidence of prior convictions is inadmissible." *Id.* at 338. *See United States v. Costa*, 947 F.2d 919, 925 (11th Cir. 1991). However, the court found that the stipulation proffered in *Taylor*, was not sufficient to prohibit the prosecution from introducing evidence of a prior conviction since the act was offered to prove other issues besides intent, including knowledge, motive, and absence of mistake. Furthermore, the court noted that the defendant offered to stipulate to the intent to buy and sell drugs, but the prosecution had to prove the intent to join a conspiracy. Thus, the proposed stipulation did not remove all issues for which it was offered. *Id.* at 339.

Since the text of the stipulation offered in *Taylor* is not provided, it is unclear what the Eleventh Circuit will deem an adequate stipulation. However, in *United States v. Cardenas*, 895 F.2d 1338, 1342 (11th Cir. 1990), the court specifically stated, "[t]here is no indication in the record that defendant would have conceded his intent to participate in the Gainesville transaction if the government proved that he was involved." This language indicates that a stipulation should offer to concede intent should the act charged be established. However, the district court in the instant case failed to give any consideration to an offered stipulation which essentially matches that mentioned in *Cardenas*. *See supra*, p. 15.[16]

---

[16] Other Eleventh Circuit cases confirm that stipulations may remove an issue and preclude 404(b) proof on that point. *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1224 (11th Cir. 1993); *United States v. Costa*, 947 F.2d 919, 925 (11th Cir. 1991); *United States v. Russo*, 717 F.2d 545, 552 (11th Cir. 1983).

Analysis

Though all circuits seem to indicate that stipulations have some bearing on the analysis involved in deciding the admissibility of 404(b) evidence, only the Second Circuit has examined this issue thoroughly, given definitive answers, and yielded consistent results. The Second Circuit has held that any true removal of the issue of intent from a case must result in the exclusion of 404(b) evidence on that issue. No magic words need to be uttered; no certain form must be used. If the defendant, through his choice of defenses, his unequivocal statements, or his offer of stipulation, relieves the government of having to prove intent, then 404(b) evidence will not be admitted for that purpose. *See supra*, p. 15.

Every Second Circuit case that has examined this issue has cited and agreed with this rule. Further, they have consistently applied the rule. In *United States v. Mohel*, 604 F.2d 748 (2d Cir. 1979), for instance, defense counsel repeatedly stated that knowledge and intent were not issues, and offered to stipulate that if the jury found that the drug action charged took place, he would concede the issue of intent. *Id.* at 752. The Second Circuit Court of Appeals found this to be an unequivocal offer to stipulate, and stated that "[o]nce that offer is made, the other crime evidence should be excluded." *Id.* at 754. Therefore, the uncharged acts should not have been admitted. *Id.*

In *United States v. Tarricone*, 996 F.2d 1414 (2d Cir. 1993), the court affirmed a lower court's ruling that 404(b) evidence was admissible to prove intent where defense counsel only stated that his defense would be to show the government's witnesses to be untruthful. The court found no clear indication that intent would be uncontested, so uncharged acts were admissible on that issue. *Id.* at 1427.

In *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980), the court reversed the trial court's admission of extrinsic acts because the defendant made clear that his defense would be that the alleged conduct had never occurred, and affirmatively stated, "There is no issue of intent." *Id.* at 940.

These decisions are consistent with each other and with the spirit of Rule 404. Extrinsic acts evidence cannot be admitted solely for the purpose of proving the defendant's bad character, because "[i]n our system of justice, we try cases, rather than persons." *People v. Allen*, 420 N.W. 2d 499, 503-04 (1988). Therefore, if extrinsic acts evidence is not relevant to a disputed issue other than character, it must be excluded. If an issue has been admitted, conceded, or stipulated, then no dispute exists on that point, and no evidence can possibly be necessary to prove it, least of all evidence which by its very nature is inherently and enormously prejudicial.

Contrary to this view, the First, Fifth and Eighth Circuits consistently hold that "[a]s a general rule, the government is not bound by the defendant's offer to stipulate." *Miller*, 974 F.2d at 960; *Ponce*, 8 F.3d at 993; *Yeagin*, 927 F.2d at 802; *Garcia*, 983 F.2d at 1175. This rule may be necessary in normal evidentiary contexts, but it has no bearing in the context of uncharged acts. For instance, in *United States v. Sampol*, 636 F.2d 621, 679 (D.C.Cir. 1980), a murder prosecution, the government sought to introduce autopsy evidence in order to show that since the force of the bombing which killed the victims was so great, the murders must have been intentional. In an attempt to preclude the admission of the autopsy reports, the defendant offered to stipulate that the victims' deaths were the result of a bombing. The court refused to require the government to accept this stipulation, since it diluted the force of the prosecution's proposed evidence. Requiring the government to accept such a stipulation would prevent them "from presenting the 'full and real life context' of the offense." *United States v. Davis*, 792 F.2d 1305 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986). The prosecution has the right to show the jury the exact crime which was committed. In the *Sampol* case, the evidence concerned the actual facts of the case. No evidentiary prohibition exists to say that the government cannot show this type of evidence, save the balancing test of Rule 403. Therefore, to require acceptance of such a stipulation would prejudice the government's legitimate case.

However, if extrinsic offense evidence is only relevant to the issue of intent, and that issue is eliminated, then it has no valid evidentiary value whatsoever. In *Parker*, the prior acts did not help to depict the crime charged. Instead, the prejudicial evidence of extrinsic acts concerned other incidents which occurred at other times. Rule 404(b) evidence, absent another legitimate purpose, simply shows acts which may have been committed in the past. Excluding them does nothing to obscure the "full and real life context" of the crime charged. *Yeagin*, 927 F.2d at 802 (quoting *Davis*, 792 F.2d at 1305). Instead, prohibiting such evidence from being introduced only "prevent[s] the jury from improperly basing its conclusion on evidence that the defendant had a propensity for a crime." *Id.* at 802.

Although the Eleventh Circuit has stated that a proper stipulation can remove the issue of intent and preclude 404(b) evidence on that point, the case law is very limited and a definition of a proper stipulation is unclear. In addition, the Eleventh Circuit does not appear to even follow its own precedent since the stipulation made in the *Parker* case, which the Court of Appeals rejected, mirrors the type of stipulation the court claims to require in the *Cardenas* case.

The Second Circuit's common sense rule that removal of the issue of intent, through whatever method, renders uncharged acts inadmissible on that point, most closely follows the spirit and purpose of Rule 404, while still allowing relevant, useful evidence to be admitted.

3. This Court should resolve the split in the United States Courts of Appeals and determine whether a proffered stipulation should be a factor considered under the Rule 403 balancing test necessary to Rule 404(b) analysis.

Application of this issue in the instant case

The district court did not engage in the 403 balancing test on the record before admitting the extrinsic acts evidence. On

appeal, the Eleventh Circuit dismissed the issue in a footnote.[17]

The Split in the Circuits

After the other *Huddleston* factors have been satisfied, extrinsic acts evidence must still pass the Rule 403 balancing test in that such evidence must be more probative than prejudicial. Only the Second, Third and Fifth Circuits appear to have addressed this issue. The First, Eighth and Eleventh Circuits fail to take a proposed stipulation into account when conducting the 403 analysis.

As noted above, the Second Circuit rejects 404(b) evidence whenever the issue on which the evidence is offered has been removed from dispute, impliedly because of its inherent prejudicial value. In 403 terms, the evidence has virtually no probative value in the face of a valid stipulation which removes the issue from the jury's consideration. *United States v. Colon*, 880 F.2d 650 (2d Cir. 1989); *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988), cert. denied, 489 U.S. 1070 (1989); *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980); *United States v. Mohel*, 604 F.2d 748 (2d Cir. 1979); *United States v. Manafzadeh*, 592 F.2d 81 (2d Cir. 1979); *United States v. O'Connor*, 580 F.2d 38 (2d Cir. 1978).

The Third Circuit notes that this Court has determined that the very reason character evidence is excluded is because it "weigh[s] too much with the jury and . . . so overpersuade[s] them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *United States v. Sampson*, 480 F.2d 883, 886 (3d Cir. 1992); *United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir. 1994). Accordingly, in *Jemal*, the court adopted a rule that "[a]n offer to stipulate does not automatically mean that the

---

[17] *See United States v. Parker*, 19 F.3d 638, n.1, where the Eleventh Circuit Court of Appeals stated, "We find no abuse of discretion as to the admission of evidence raised in the appellant's second and third issues and will not address those issues any further."

fact may not be proved . . . so long as the probative value of the proof still exceeds the prejudicial effect taking into account the offer to stipulate." *Jemal*, 26 F.3d at 1274; *United States v. Provenzano*, 620 F.2d 985, 1003-04 (3d Cir. 1980); *United States v. Sheeran*, 699 F.2d 112 (3d Cir. 1983). However, the Court of Appeals also generally observed that where the defense has offered a valid stipulation, the relevance of uncharged misconduct "will be minimal . . . since the evidence will not bear on the issues being contested, . . . and . . . undue prejudice will be quite high since prior bad acts evidence tends to be quite persuasive." *Jemal*, 26 F.3d at 1274. For these reasons, "district courts should generally deem prior bad acts inadmissible to prove an issue that the defendant makes clear he is not contesting." *Id.*

In *Ponce*, the Fifth Circuit considered this issue since the defendant argued that "had the court accepted his proposed stipulation, the extrinsic offense evidence would have been sapped of its probity. With . . . unlawful intent no longer in dispute, the probative value of the prior conviction would be substantially outweighed by its prejudicial impact. . . . " *Ponce*, 8 F.3d at 993. The court implicitly accepted this analysis when they stated that "the success of [this] argument hinges on whether the trial judge properly refused to accept the proposed stipulation." *Id.*[18] The court was implying that the prejudicial impact would outweigh the probative value of the evidence if the stipulation offered was adequate to remove the issue of intent.

In contrast, the First, Eighth and Eleventh Circuits do not even consider the effect of a stipulation on Rule 403 analysis. *United States v. Garcia*, 983 F.2d 1160 (1st Cir. 1993); *United States v. Ferrer-Cruz*, 899 F.2d 135 (1st Cir. 1990); *United States v. Miller*, 974 F.2d 953, 954 (8th Cir. 1992); *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994).

---

[18] However, the proposed stipulation was rejected as improper for unrelated reasons. *Id.* at 993-94.

Analysis

Critical to an understanding of this analysis is the true definition of prejudicial. "Evidence is prejudicial only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980); *See, Advisory Committee Notes to Rule 403*; S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* 43 (2d ed. 1978 Supp.). Prejudice may be the result of "the tendency of the evidence to prove some adverse fact not properly in issue or unfairly to excite emotions against the defendant." *Figueroa*, 618 F.2d at 943. Thus, 404(b) evidence may be probative of some legitimate fact in issue, but it also tends to prove that the defendant is a person of bad character – an impermissible, prejudicial inference. This evidence is only to be admitted when the probative value of the evidence on the legitimate issue outweighs its inherent prejudicial effect.

The Advisory Committee Notes to Rule 404(b) expressly require trial courts to consider less prejudicial alternatives to 404(b) evidence. *See, Advisory Committee Notes to Rule 404*. Logically, "[r]ule 403 would appear to make it proper for the court to consider the defendant's offer to stipulate as one element in the balancing required in exercising its discretion to exclude relevant evidence." Wright & Graham, *Federal Practice & Procedure*, § 5194 (1978).

In the face of a valid stipulation which removes intent as an issue without prejudicing the government's legitimate case on the charges at hand, uncharged misconduct evidence must be excluded under the 403 balancing analysis. As mentioned above, 404(b) evidence is excluded precisely because of its prejudicial effect, but, if such evidence is relevant to some disputed issue other than character, it may be admitted for that purpose. If that particular purpose is removed, then the evidence is unnecessary and prejudicial. The only remaining connection between the evidence and the charge at hand is the tendency of the previous acts to show the defendant's propensity to commit crime, an inference strictly forbidden by Rule 404. This renders the probative value of the evidence, at best,

minimal, and increases the prejudicial effect to alarming proportions. In fact, in the face of a valid stipulation which removes an issue from dispute, the only value 404(b) evidence can possibly have is prejudicial value. It is useful for no other purpose.

4. This Court should resolve the split in the United States Courts of Appeals and determine whether the amount of 404(b) evidence admitted weighs upon the Rule 403 analysis.

Application of this issue in the instant case

In Mr. Parker's second trial, the government called a total of fifteen (15) witnesses, seven (7) of whom testified to facts related to the offense charged, and eight (8) of whom testified to extrinsic offenses. Excluding technical witnesses, such as the fingerprint expert, the chemist, and the Dial-Page manager, none of whom offered any facts incriminating Mr. Parker, only 4 witnesses testified about the charged crime as opposed to twice that number testifying to extrinsic crimes. Mr. Parker's past essentially became the main feature of his second trial. The effect of this questionable evidence was profound: without it, the first trial resulted in an acquittal as to one count and a hung jury as to the other two counts, but with Mr. Parker's past displayed, he was convicted. There can be little doubt that this extrinsic evidence tipped the scales against Mr. Parker. Despite this, the district did not consider the effect that the sheer amount of extrinsic acts evidence was having on Mr. Parker's trial. On appeal, the Eleventh Circuit dismissed the issue in a footnote.[19]

The Split in the Circuits

The Fifth and Eighth Circuits have considered this issue and have determined that the amount of 404(b) evidence

---

[19] See supra n.17.

makes a difference in the effect that such evidence may have on a trial. On the other hand, the Eleventh Circuit refused to consider the issue, and affirmed Mr. Parker's convictions although the convictions were based on the admission and overwhelming amount of 404(b) evidence.

The Fifth Circuit has examined this issue in the most detail in *United States v. Ponce*, 8 F.3d 989 (5th Cir. 1993). The court distinguished its decision from its previous decision in *United States v. Yeagin*, 927 F.2d 798 (5th Cir. 1991). In *Yeagin*, the court ruled extrinsic acts inadmissible to prove intent in the face of a valid stipulation removing the issue from dispute, while in *Ponce*, the court refused to exclude similar evidence. Among other reasons for the distinction, the court noted that many uncharged acts were admitted in *Yeagin*,[20] while the prosecution only sought to introduce one in *Ponce*. The court found that the sheer number of acts admitted in *Yeagin* magnified their prejudicial impact. Eighth and Tenth Circuit precedent concurs: the greater the amount of trial time devoted to proof of the extrinsic facts, "the greater the prejudice to the defendant is likely to be." 22 Wright & Graham, *Federal Practice and Procedure: Evidence*, § 5250; *United States v. Fortenberry*, 860 F.2d 628, 632 (5th Cir. 1988); *United States v. Sheperd*, 739 F.2d 510, 513 (10th Cir. 1984); *United States v. Jones*, 570 F.2d 765, 769 (8th Cir. 1978).

As noted previously, the Eleventh Circuit Court of Appeals dismissed this issue in a footnote.

Analysis

The holdings of the Fifth, Eighth, and Tenth Circuits on this issue are instructive. The amount of 404(b) evidence admitted may profoundly affect the Rule 403 analysis.

The amount of extrinsic acts evidence presented in Mr. Parker's second trial prejudiced his case. Mr. Parker's trial should have been focused on the charges at hand and the

---

[20] Evidence of nine (9) prior convictions was admitted. *Yeagin*, 927 F.3d at 803.

government's evidence against him on those charges. Instead, the government's case was more concerned with Mr. Parker's past. However, Mr. Parker's past was not the subject of the trial, and it should not have been treated as such.

As was the case in *Yeagin*, Mr. Parker's second trial is "a prime example of prior conviction overkill." See *Ponce*, 8 F.3d at 994. And, as in *Yeagin*, "[t]he multiplicity of the other crimes evidence . . . magnified its prejudicial effect." *Id.* Even if some of the prior acts evidence was properly admitted in Mr. Parker's case, there is a point at which other acts evidence becomes so overwhelming as to become prejudicial solely by virtue of its sheer volume. Although the Eleventh Circuit failed to examine this issue, that point was reached in Mr. Parker's case.

5. This court should reverse the decision of the United States Court of Appeals for the Eleventh Circuit affirming the trial court's admission of evidence of a separate conspiracy as substantive evidence, since, pursuant to Supreme Court Rule 10.1(a), such a departure from the usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

Application in the instant case

The testimony of Shirelle Merit that she transported drugs to South Carolina at the request of someone named "E" was also erroneously admitted as evidence of the charged conspiracy.[21] See A.E, 29e-30e. On appeal, the Eleventh Circuit dismissed this issue in a footnote. See *Parker*, 19 F.3d at 638, n.1.

---

[21] This evidence was admitted as both substantive and extrinsic evidence. The preceding arguments explain why admission of this evidence pursuant to Rule 404(b) was improper, while this argument demonstrates why it was improper to admit this testimony as evidence of *this* conspiracy.

It should also be noted that Ms. Merit could not identify Mr. Parker, nor did she recognize him, a fact which the prosecutor conveniently left out of his proffer of proof, and a fact to which the judge was not privy when he made his decision on the admissibility of this testimony. See A.F, 1f-2f. Thus, her testimony is, at best, minimally probative and highly prejudicial.

Analysis

The agreement between Merit and "E", assuming "E" were Mr. Parker, was clearly a separate agreement from the purported agreement of Mr. Parker with Lymon, Gray, and Ellerby. It had a separate object – to transport drugs from Miami to South Carolina – which did not involve the Northern District of Florida whatsoever. The only conceivable connection between the two agreements is that Merit was a friend of Lymon, who allegedly introduced Merit to Mr. Parker as a potential courier. However, the conspiratorial conduct of Merit did not begin until she entered into her own agreement with "E" and carried out that agreement. The parties to this agreement were only Merit and "E", and their conduct was not connected with the charged conspiracy.

Because Lymon and Merit each had their own independent missions, any alleged conspiracy involving both, with Mr. Parker at the center would have to be a "wheel conspiracy," that is, a hub ("E") with spokes extending outward (Lymon, Gray, Ellerby and Merit). As the Court of Appeals for the Eleventh Circuit explained in *United States v. Fernandez*, 892 F.2d 976, 986 (11th Cir. 1989):

> For a wheel conspiracy to exist those people who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise. *Blumenthal v. United States*, 332 U.S. 539, 556-57 (1947). Otherwise the conspiracy lacks "the rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 755 (1946). If there is not some interaction between those conspirators who form the spokes of the wheel as to at least one common illegal object, the "wheel" is incomplete, and two conspiracies rather than one are charged.

Because those on each spoke of the alleged conspiracy (Merit on one spoke; Gray, Ellerby, and Lymon on another) operated independently, each spoke represents a separate conspiracy, even though each of these separate conspiracies may have had similar objectives and the same hub. In reversing a conviction because of a

variance between the conspiracy charged and the one that the evidence showed existed, in *United States v. Castro*, 829 F.2d 1038, 1045 (11th Cir. 1987), this Court explained the distinction between one and multiple conspiracies:

> Though each of the conspiracies had, broadly speaking, a similar illegal objective – i.e., each aided, by fraudulent means, Alberto's efforts to obtain cash for his companies – neither depended on, was aided by or had any operational interest in the success of the other conspiracy.

Similarly, the individual spokes in the instant alleged conspiracy "neither depended on, [were] aided by or had any operational interest in the success of the other [spokes]." *Id.*

Since Shirelle Merit's testimony obviously concerned a separate conspiracy, and the district court should not have admitted the evidence substantively in this prosecution, the evidence could only have been introduced pursuant to Rule 404(b). As such, the judge would have been required to give the jury a limiting instruction regarding the use of this testimony.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted this 28th day of October, 1994.

Respectfully submitted,

EDWARD S. STAFMAN
Counsel of Record for Petitioner
6950 Bradfordville Road
Tallahassee, Florida 32308-1804
(904) 681-7830

WILLIAM D. MASSEY
Counsel for Petitioner
100 N. Main, Suite 3010
Memphis, Tennessee 38103
(901) 525-4357

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Eric Antonio PARKER, a/k/a "E",
Defendant-Appellant.

No. 92-3325.

United States Court of Appeals,
Eleventh Circuit.

April 27, 1994.

Defendant was convicted of distribution and possession with intent to distribute crack cocaine in the United States District Court for the Northern District of Florida, No. 90-04007-WS, William Stafford, J., and defendant appealed. The Court of Appeals held that statements made by defendant were admissible at trial because they were not immunized by police officers' promise that if defendant consented to search of his home no evidence found there would be used against defendant.

Affirmed.

Edward S. Stafman, Tallahassee, FL, for appellant.

Thomas F. Kirwin, Asst. U.S. Atty., Tallahassee, FL, for appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before BLACK, Circuit Judge, FAY, Senior Circuit Judge, and UNGAROBENAGES,* District Court Judge.

PER CURIAM:

---

*Judge Ursula Ungaro-Benages, U.S. District Court for the Southern District of Florida, sitting by designation.

Eric Antonio Parker ("Parker") was convicted in the District Court for the Northern District of Florida ("Tallahassee case") of two counts of distribution and possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2. He appeals that conviction and raises several evidentiary issues for our review.[1] Because we find no error, we AFFIRM.

I. FACTS

Prior to the trial in the instant case, Parker was tried and convicted of drug conspiracy in the District Court for the Western District of Tennessee ("Memphis case"). Due to a series of trial errors, the Sixth Circuit reversed that conviction. *United States v. Parker*, 997 F.2d 219 (6th Cir. 1993). However, some of the evidence used against Parker at the trial is the subject of an issue on appeal before us.

After agents in Memphis arrested Parker and advised him of his constitutional rights, he consented to a search of his home pursuant to an Assistant U.S. Attorney's promise that anything found would not be used against

---

[1] We find no abuse of discretion as to the admission of evidence raised in the appellant's second and third issues and will not address those issues any further. *United States v. Miller*, 959 F.2d 1535 (11th Cir.1992); *United States v. Hawkins*, 905 F.2d 1489 (11th Cir.1990). Furthermore, viewing the evidence in a light most favorable to the government, we find that the government proved by a preponderance of the evidence that the offense took place within the trial district. *United States v. Burroughs*, 830 F.2d 1574, 1580 (11th Cir.1987). Accordingly, we will not address the appellant's final issue any further. Thus, the only issue left to address is the question of an alleged immunity agreement.

him. Parker also gave a statement to investigators explaining the cocaine operation and admitting his involvement. The Memphis prosecutors sought to use the statements against him at trial. Parker filed a motion to suppress the statements and argued that equitable immunity rendered the statements inadmissible. The District Court for the Western District of Tennessee conducted a hearing and denied the motion. Accordingly, the statements were used against Parker in the Memphis case.

The prosecutor in the Tallahassee case gave notice, pursuant to *Fed.R.Evid.* 404(b), of their intent to use the statements Parker made during the Memphis investigation in their case-in-chief.[2] Parker filed a motion to suppress the statements and the motion was set for a hearing. The parties agreed to submit the transcript of the Memphis suppression hearing in lieu of live testimony in the Tallahassee suppression hearing.

Parker argued that *both* the statements *and* any evidence discovered at his home were immunized by the Memphis prosecutor's promise. The government argued that because the issue had been decided in the Memphis case and the evidence was admitted, Parker was collaterally estopped from challenging the admission of the statements in the Tallahassee case. The government also argued, in the alternative, that the promise *only* covered the physical evidence discovered at Parker's home and did not extend to any of the statements Parker made after being apprised of his rights.

---

[2] It appears that the trafficking methods employed in the Memphis and Tallahassee cases were nearly identical.

After reading the Memphis transcript and hearing arguments of both the prosecution and the defense, the Florida District Court analyzed the admissibility of the statements:

> I understand Mr. Parker's contention before me is that by giving law enforcement a right to consent to a search of his premises, upon the promise, that no evidence obtained as a result of that consensual search would be used against him here or anywhere else; that this was a – an immunity pact, as I see it, which would have precluded law enforcement or the prosecution in – in the Western District of Tennessee or here, from introducing into evidence oral statements made by Mr. Parker after he was properly immunized, that it would be unfair and a violation of his Fifth Amendment rights for the prosecution, on one hand, at some point, doing an interview saying, if you will help us out to nail this guy, Taven Chandler, by letting us search your place, we won't use that evidence against you. And I think Mr. Parker says that, as I see it, the rules changed, and therefore, if he did as law enforcement asked him to do and gave them the right to search his premises, that they should be held to what he contends is their side of the agreement, that is that no evidence obtained from him during the search of during the interview could be used against him.

It seems to me that, first of all, we have no – no question that in this case the government is not going to try to introduce any – any evidence taken from Mr. Parker's premises, nor will the government seek to introduce any evidence that could have resulted from anything the

government of law enforcement discovered at Mr. Parker's premises. And the issue then is really narrow as to whether what Mr. Parker told the officers after being properly immunized can be admissible in this case.

* * *

It seems to me that there is nothing in the record to suggest that law enforcement, by asking to consent to a search of Mr. Parker's residence, indicated to him that his statements made to them, either before or after that, relating to matters other than his premises, were not going to be used against him. I think, as I – as I see the evidence before me, he had already begun to implicate himself in – in the activity forming the basis of this – of this case, and perhaps giving the evidence that would be 404(b) evidence in this trial in this district.

The immunity that was granted to Mr. Parker on the consent of this – to get consent to search his premises was limited to that – that search, that physical search of his – of his premises and does not extend to any oral statements that he – that he made.

(SR 1-31-33).

Based on the above analysis, the District Court denied Parker's motion to suppress the statements.

II. DISCUSSION

We review the question of whether there are facts sufficient to afford a defendant immunity from prosecution under a clearly erroneous standard. *United States v. Weaver*, 905 F.2d 1466 (11th Cir.1990), *cert. denied sub nom.* 498 U.S. 1091, 111 S.Ct. 972, 112 L.Ed.2d 1058 (1991).

Parker argues that the court applied a collateral estoppel theory based on the admission of the same evidence in the Memphis case and that because the Sixth Circuit reversed the District Court's decision, the evidence should be excluded here. We disagree for several reasons.

First, the District Court engaged in a thorough and objective examination of the evidence, *United States v. Calimano*, 576 F.2d 637, 640 (5th Cir.1978), and reached the collateral estoppel analysis *after* it rejected Parker's equitable immunity theory on the merits. Second, the Sixth Circuit reversed Parker's Memphis conviction on several grounds other than the admission of the statements he made to Memphis investigators. With regard to those statements, the Court directed the District Court to reexamine the question of immunity more fully. *Parker*, 997 F.2d at 223. We think that the Sixth Circuit wanted the Memphis District Court to engage in precisely the type of analysis that took place here. Because we find no clear error in the District Court's determination that the immunity agreement did not include statements made to investigators, we AFFIRM the conviction.

III. CONCLUSION

For the above reasons, Parker's conviction is AFFIRMED.

AFFIRMED.

APPENDIX B

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-3325

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERIC ANTONIO PARKER, a/k/a/ "E"

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

(Filed June 20, 1994)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion April 27, 1994, 11th Cir., 19__, ___F.2d___).

Before: BLACK, Circuit Judge, FAY, Senior Circuit Judge, and UNGARO-BENAGES*, District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

---

* Hon. Ursula Ungaro-Benages, US District Judge for the Southern District of Florida, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

LORD-42 (9/90)

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v. Case Number TCR 90-04007-01

ERIC ANTONIO PARKER aka: "E"
Defendant.

JUDGMENT IN A CRIMINAL CASE

(Filed Dec. 23, 1992)

The defendant, ERIC ANTONIO PARKER aka: "E", was represented by William Massey, Memphis, Tennessee.

The defendant has been found not guilty on count(s) 2 and is discharged as to such count(s).

The defendant was found guilty on count(s) **1 and 3 after a plea** of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

TITLE & SECTION	NATURE OF THE OFFENSE	DATE CONCLUDED	COUNT NUMBER
21 USC 846	**Conspiracy to Possess With Intent to Distribute Cocaine Base**	**2/13/90**	**1**
21 USC 841	**Possession With Intent to Distribute Cocaine Base**	**2/13/90**	**3**

As pronounced on December 18, 1992, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100, for count(s) **1 and 3,** which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Singed this 23rd day of December , 1992 .

/s/ William Stafford
William Stafford
United States
District Judge

Defendant's SSAN: 266-51-7053
Defendant's Date of Birth: 03-26-62
Defendant's address: 17760 N.W. 17th Avenue, Miami, Florida

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **Life on Counts 1 and 3 to run concurrently.**

The defendant is remanded to the custody of the United States Marshal.

RETURN:

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered:

on _____ to _____

at _____, with a certified

copy of this

Judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of ten (10) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

4. The defendant shall submit to a program of drug testing for the detection of illegal drug use.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	42
Criminal History Category:	VI
Imprisonment Range:	360 months of Life
Supervised Release Range:	10 years
Fine Range:	$25,000 to $8,000,000
Restitution:	n/a

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence of Life conforms to the guideline range for custody and meets the goals for punishment and general deterrence. The specific sentence of life is

required by Federal Statute because the defendant has at least two prior felony drug convictions.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs.

ERIC ANTONIO PARKER, aka "E"

INDICTMENT

UNDER SEAL

_____/

THE GRAND JURY CHARGES:

COUNT I

That from a date unknown to the grand jury but at least by November 10, 1988 and continuously thereafter, up to and including the date of this indictment in the Northern District of Florida and elsewhere, the defendant,

ERIC ANTONIO PARKER, aka "E"

did unlawfully combine, conspire, confederate, agree, and have a tacit understanding with Carl Gray, aka "Dee," Katrina Lymon and with other persons to knowingly and intentionally distribute and possess with intent to distribute fifty grams or more of a substance containing cocaine base, commonly known as "crack cocaine," a controlled substance all in violation of Sections 841 and 846 of Title 21 of the United States Code.

COUNT II

That during the period November 10, 1988 to November 20, 1988, in the Northern District of Florida and elsewhere, the defendant,

ERIC ANTONIO PARKER, aka "E"

aided and abetted by Carl Gray, aka "Dee," Katrina Lymon and others as yet unknown did knowingly and intentionally distribute and possess with intent to distribute fifty grams or more of a substance containing cocaine base, commonly known as "crack cocaine," a controlled substance being in violation of Title 21, United States Code, Section 841 and Title 18, United States Code Section 2.

COUNT III

That during the period December 5, 1988 to December 10, 1988, in the Northern District of Florida and elsewhere, the defendant,

ERIC ANTONIO PARKER, aka "E"

aided and abetted by Carl Gray, aka "Dee", Katrina Lymon and others did knowingly and intentionally distribute and possess with intent to distribute fifty grams or more of a substance containing cocaine base, commonly known as "crack cocaine," a controlled substance being in violation of Title 21, United States Code, Section 841 and Title 18, United States Code, Section 2.

A TRUE BILL:

/s/ Tom Lanz Kiele
FOREMAN

Feb. 13, 1990
DATE

/s/ Lyndia P. Barrett
LYNDIA P. BARRETT
United States Attorney

/s/ Charles S. White
CHARLES S. WHITE
Assistant U.S. Attorney

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERIC ANTONIO PARKER,

Defendant,

_____/

TALLAHASSEE
CRIMINAL
90-04007

TRANSCRIPT OF PRETRIAL MOTIONS AND FIRST DAY OF TRIAL

The above-entitled matter came on to be heard before the Honorable WILLIAM STAFFORD, Chief United States District Judge, in the United States Courthouse, Tallahassee, Florida, on the 23rd Day of September, 1992, commencing at 9:10 a.m.

APPEARANCES:

For the Government: THOMAS F. KIRWIN
Assistant United States Attorney
315 S. Calhoun St., Suite 510
Tallahassee, FL 32301-1841

For the Defendant: WILLIAM D. MASSEY
Attorney at Law
100 North Main, Suite 3010
Memphis, Tennessee 38103

-and-

JOHN E. HERBISON and
REBECCA FREEMAN
Attorneys at Law
2016 Eighth Avenue South
Nashville, Tennessee 37204

[p. 2] PROCEEDINGS

(Jury selection of September 22, 1992 not transcribed)

(Jury not present)

THE COURT: Good morning, everyone. Please be seated.

Are there witnesses to be sworn?

MR. KIRWIN: Judge, I have talked with Mr. Herbison, and I think he is in agreement that we will proceed by proffer of the expected testimony that is the basis of the –

THE COURT: All right.

MR. KIRWIN: – 404(b) evidence.

MR. HERBISON: Correct, Your Honor.

THE COURT: All right.

MR. KIRWIN: Judge, I would like to introduce – this is Officer Don DeBlanc. I'm using him as the case agent for this portion of this trial. He is from the Houston Police Department and was the case agent on one of the cases in question.

THE COURT: All right.

MR. KIRWIN: If I may, then, Judge, by means of proffer, there are two incidents which I gave notice of

under 404(b). And I guess to be clear, Judge, I'm not talking about the instances that we had in the first trial, that is the South Carolina incident where the court ruled that that would not become admissible, and then the Memphis incident which the [p. 3] court ruled was admissible. I'm addressing here the two incidents in Texas.

THE COURT: All right, sir.

MR. KIRWIN: All right. Judge, the – the two incidents that are involved by amended notice of intent to use evidence of other crimes or wrongs, and they involved the first incident which occurred in August of 1987, it involved a conspiracy to distribute and possession with intent to distribute crack cocaine and actual distribution of crack cocaine. The facts in that case are that I believe August the 7th, 1987, but –

(Discussion off the record)

MR. KIRWIN: August the 7th, 1988, Officer DeBlanc, Officer McFadden, Officer Thrailkill, another officer named Berry and other officers were involved in a – a search, execution of a search warrant. A decision was made to go on ahead and make a purchase from individuals that were appearing to be selling crack cocaine out in front of the area where the search warrant was to be executed. Officer DeBlanc was riding in a truck with Officer Berry, they drove up to the individual that was in the –

(Discussion off the record)

MR. KIRWIN: – in the driveway near the area to be searched. Officer DeBlanc held up his hands, put

one finger out, which he would testify is a – a common body language [p. 4] sign for a person who is interested in purchasing controlled substances. The defendant Parker was the person that he addressed, or that was out there on the street. Parker told him to get out of the truck. He got out of the truck. Parker asked him what he wanted, he told him he wanted, I think, a $25 rock. Parker said, no, you don't want that, what you want is a $15 and a $10, two pieces for the same amount. Officer DeBlanc agreed to do that. Parker indicated that DeBlanc should walk over to another man who was some – some years away, indicating that that man would take care of him. As Officer DeBlanc walked over to that man, Parker, the defendant, yelled over to the man, take care of this man, and the man later identified as McGuire, Mr. McGuire, yelled back to Parker, okay.

Officer DeBlanc goes to McGuire, they have a negotiation about the size of the particular pieces and the quality of it, and he pays – DeBlanc buys two pieces from McGuire and pays him in marked money, a $20 bill and a $5 bill. He goes back to the truck, gets in the truck, DeBlanc does, and they drive away giving a signal on the radio to the arrest team, giving the description of the people involved.

The arrest team comes in, and that involves Officer McFadden and Officer Thrailkill. Using the description given to them, they arrest the two subjects, one of the subjects is the defendant in this case, the defendant Parker, and the [p. 5] other subject is McGuire. When Parker is arrested he has a large amount of money on him, I think $2400, I think 2407, around that neighborhood, and

the marked $20 bill that has Officer DeBlanc's initials on it and his badge number on the other side of the bill.

THE COURT: Let me find out, did Officer DeBlanc pay Parker or McGuire?

MR. KIRWIN: He paid McGuire, sir.

THE COURT: But when he got arrested, some of that marked money was in Mr. Parker's –

MR. KIRWIN: The $20 bill was in Mr. Parker's pocket, the $5 bill was in Mr. McGuire's pocket.

THE COURT: Okay. Thank you.

MR. KIRWIN: At the point of the arrest McGuire runs, Officer Thrailkill chases him down, he observes him throwing down an object, the object turns out to be a big bag containing, I think, 19 bags of crack cocaine. He's got a sizable amount of money on him, as well, that's as large as the amount of money that Parker has on him, and he has the marked $5 bill that he had gotten from Officer DeBlanc.

And that would be essentially the – the proffer on – on that case.

There is another case, and this occurred in January of 1985. And this would involve the testimony of an Officer Jim Krol, K-R-O-L, with the Houston Police Department.

[p. 6] He was on duty in the early morning hours, I think, of January 16th of 1985 in Houston, and he observed a car speeding on one of the freeways. I'm not sure which one it was, Judge, but the car was, I believe, doing 81 in a 55, or a substantial speed, I'm not sure

that's the right number either. The car is stopped for speeding. The defendant, Parker, is driving the car. He is questioned about whose car it is, he gives a rental contract. Rental contract is not in his name, it's not in the name of anybody in the car.

So they removed Parker from the car and take him to the side road away from the freeway traffic. He is patted down, a hard object is found in his – in his pants. It turns out the hard object, when he takes it out, is a large roll of bills. I forget what the amount is, but it's in the neighborhood of $1800, I believe.

(Discussion off the record)

MR. KIRWIN: Twenty-two hundred dollars, Judge, and there is also a small amount of cocaine and marijuana.

In this part of the proffer there are three other persons inside that car, two of them are female, the third one is a man who gives his name as Donald Wellington Gray. When he is brought back, he also has a large amount of money on him. He is brought back to the station, they do a print check, and it turns out that Donald Wellington Gray is actually Carl Gray, who, as the court is aware, is a [p. 7] co-conspirator in the case pending before the court.

There was some comments made by the people in the car basically that they were – I believe they were going to the Super Bowl, but they didn't know where the Super Bowl was, they didn't know who was playing in it and they were going to the wrong city, something that would alert the officer.

Those would be the proffers as to those separate incidents.

THE COURT: Okay. Yes, sir, Mr. Herbison.

MR. HERBISON: Okay. May it please the court? My remarks would apply not only to the evidence proffered just now, but also to the evidence that was – the 404(b) evidence that was admitted at the first trial. While we don't intend to – to relitigate what was before the court at that time, don't question the validity of Your Honor's ruling admitting part of that and excluding part of the 404(b) evidence, we do have a different wrinkle to – to throw into this trial.

In order for evidence to be admitted under 404(b), it, of course, has to be probative of an issue that's actually disputed at trial. And where the government has other proof of that issue that is sufficiently strong, then under Rule 403 the proffered 404(b) evidence should be excluded because it adds very little to the government's case, and the danger of unfair prejudice substantially outweighs the probative value.

The Eleventh Circuit addressed that doctrine in [p. 8] *United States versus Pollack,* P-O-L-L-A-C-K, 926 Federal Reporter, 2nd Edition, Page 1044. Addressed the question that where the government's proof is otherwise strong, the evidence should be excluded; whereas if the government's proof on the disputed issue is weak, then the 404(b) extrinsic evidence should be admitted. The court there characterized that as heads-I-win, tails-you-lose proposition of law from the prospective of the defendant.

Here, however, if the proof adduced at the first trial by the government is not sufficient to support a finding of intent by this defendant, Fifth Amendment commands we shouldn't even be here.

THE COURT: Run that by me again.

MR. HERBISON: Okay. Your Honor, if the evidence adduced at the first trial was not sufficient to support a finding of intent, which is the issue that the government has offered this on, then the evidence was insufficient to support a conviction and the government should not be getting a second bite at this apple at all under double jeopardy clause. This is not heads-I-win –

THE COURT: How do you know it's intent?

MR. HERBISON: I beg your pardon?

THE COURT: How do you know it was intent that hung up the jury?

MR. HERBISON: We do not know that it was intent that [p. 9] hung up the jury. However, we do know that intent was the rationale that the government offered for admitting this evidence to begin with, and if proof – if proof of intent that the government proffered at that trial placed before the jury is not sufficient, it doesn't matter whether that or another issue was what hung the jury. If the evidence of intent adduced at that trial is insufficient, then the government simply failed to prove an essential element of the case. And the government, not having proved every element of the case, not having adduced sufficient evidence to prove every element of the case, then that's what the double jeopardy clause is all about,

the retrial would simply be barred. This is not heads-I-win, tails-you-lose.

THE COURT: Well, do you have a motion before me to stop this prosecution on the basis of former jeopardy?

MR. HERBISON: We do not have such a motion. However, I would submit that the government cannot have it both ways. If the – the government cannot contend both that the former evidence was such, and now contend that the additional evidence of intent under Rule 404(b) should come in. Because if the evidence at the first trial was sufficient, then newly proffered evidence simply does not add to the government's case anything that is not substantially outweighed by the danger of unfair prejudice. It's not heads-I-win, tails-you-lose, it's heads-the-government-wins, [p. 10] tails-the-government-should-not-be-in-court.

THE COURT: I think you turned that a hundred eighty degrees. Said if you can't win on the evidence at the first trial, you can't introduce any more, and you certainly can't shore up your evidence on intent. And, of course, in the case in the Eleventh Circuit, as I recall, intent is the issue. I mean as long as intent is there, 404(b) evidence is admissible, and unless your – your client is willing to admit intent, it seems to me that otherwise proper 404(b) evidence should not be excluded.

And I think the law, as you stated it, is correct. It's kind of a sliding scale, you know. If the other evidence is overwhelming, then 404(b), you can keep out maybe under that provision of 403 that says, you know, it's cumulative and maybe not necessary.

MR. HERBISON: Your Honor, 404 –

THE COURT: Your evidence on intent is a little weak as I read those cases, and maybe counsel can straighten me out on them, but I think that's the way I read it, then this 404(b) becomes even more relevant.

MR. HERBISON: I would agree with Your Honor's characterization of the Eleventh Circuit cases there. However, I am saying that the other evidence that the government can offer in this case, has in fact offered in another trial, is one of – that evidence of intent is one [p. 11] factor in the 403 analysis which is one of the three-part tests of whether 404(b) evidence is admissible.

THE COURT: Uh-huh.

MR. HERBISON: I would propose that the defense in this case is willing to stipulate that if the jury finds beyond a reasonable doubt that Katrina Lymon received the cocaine in issue from Eric Parker, and if Eric Parker paid Katrina Lymon to fly it to Tallahassee, then that would establish the intent to deliver.

THE COURT: Now, how in the world –

MR. HERBISON: To deliver and the intent for Mr. Parker to conspire with Katrina Lymon. We are willing to proffer that stipulation. That actively removing intent from the case would exclude not only 404(b) extrinsic evidence proffered today, but also the details of the Memphis transaction that was admitted into evidence at the first trial. The Eleventh Circuit, *United States versus Hernandez*, 896 Fed. 2d 513, opined that if the intent is not a contested issue, that under the stipulation it would not be, then 403 requires exclusion of the extrinsic evidence.

THE COURT: Well –

MR. HERBISON: The Eleventh Circuit, again, in *United States versus Costa*, C-O-S-T-A, 947 Fed. 2d 919, noted that a – a stipulation, and it is – I will grant that, if a stipulation would remove intent as an issue, it was [p. 12] because the defendant was not willing to stipulate in that case that intent was placed in issue.

The most thorough treatment of a stipulation of removing intent as an issue that I know of is a Second Circuit case, *United States versus Mohel*. I'm not sure of the pronunciation, spelling is M-O-H-E-L, that's reported at 604 Federal Reporter 2nd, Page 748, that's a 1979 decision of the United States Court of Appeals, Second Circuit.

There is a detailed treatment of that, and Second Circuit Court there opined that an unequivocal offer or stipulation or concession serves to remove intent and knowledge as issues in the case, that's at Page 753. And the government cannot, by evading an unequivocal offer to stipulate, create an issue as to intent and knowledge solely to have the extrinsic evidence of intent admitted.

With that in mind, we offer that proposed stipulation.

THE COURT: Now, let me – let me find out what – what I thought I heard you say, that was if the jury finds so and so and so and so, you are willing to stipulate to intent?

MR. HERBISON: We will stipulate that if the jury finds beyond a reasonable doubt that Katrina Lymon received cocaine from Eric Parker, and that Mr. Parker paid Ms. Lymon to fly that cocaine to Tallahassee, then that would establish his intent.

[p. 13] THE COURT: Well, how in the world am I going to find that out in the middle of a trial?

MR. HERBISON: Your Honor –

THE COURT: I mean, do you have some local rule in Western Tennessee that allows the court to send the jury out at different times through the trial and say, now, folks, based upon what you heard so far, answer this question?

MR. HERBISON: No, Your Honor, it's not a local rule But the *Mohel* case from the second circuit is exactly on point there.

THE COURT: What's that?

MR. HERBISON: The defense theory.

THE COURT: Are you familiar with the idea of a stipulation?

MR. HERBISON: Uh-huh.

THE COURT: You know, if the party enters into it, you know, it kind of blows away the need for the 404(b).

MR. HERBISON: Exactly.

THE COURT: That's not what you are saying to me. That's not what you are offering here. You're offering an after-the-fact stipulation that if the jury finds so and so and so and so, and that's really no stipulation at all, you know, the ball game is over, and then you want to come in and agree to the score.

MR. HERBISON: Your Honor, it's the position of the [p. 14] defense that the transaction described did

not take place at all. It's not a question of whether Mr. Parker had intent, it's not a question of whether there was a mistake. Those are not even issues in this case. It's the position of the defense that the government is – is simply trying to illicit [sic] from an admitted perjurer evidence of a transaction which in fact never took place.

THE COURT: Okay.

MR. HERBISON: And I commend the court to the reasoning of the Second Circuit case that I cited.

THE COURT: I have no doubt that you correctly stated Second Circuit law in 1979, but I don't think that addresses our issue here at all. In other words, you're not willing to stand up in front of this jury at the beginning of the trial and say my client and I announce to the – to the court and to the jury that we intended to – to distribute cocaine, we intended to conspire with Katrina Lymon and Carl Gray to distribute. You're not saying that.

MR. HERBISON: No, we are certainly not saying that.

THE COURT: Well, that leaves intent in the issue – in the case, then, doesn't it?

MR. HERBISON: We submit that it does not. It makes the case rise and fall on the testimony of Ms. Lymon and whether the jury accredits Ms. Lymon.

THE COURT: Well, how do I determine that? How do [p. 15] you determine that?

MR. HERBISON: By instructing the jury, if you find –

THE COURT: That what?

MR. HERBISON: Find these facts, then the parties agree to these further facts.

THE COURT: But I can't tell them that these facts exist only if certain other things happen, huh?

MR. HERBISON: I don't see why Your Honor cannot.

THE COURT: I mean, you can get up and argue that he didn't have the intent.

MR. HERBISON: No, we would not be arguing that he did not have the intent under those circumstance [sic]. We would argue the transaction described by Ms. Lymon did not take place at all.

THE COURT: Okay. Anything else on this – on this offer of this evidence out of Houston?

MR. HERBISON: Just that once intent is removed as an issue, all we've got is pure propensity evidence that should be excluded under 404(a).

THE COURT: Okay. Anything else?

Mr. –

MR. KIRWIN: Yes, sir. Judge, I think the court has zeroed in on it correctly. This is a conditional stipulation. This is not the unequivocal stipulation or unequivocal offer [p. 16] to stipulate. I haven't read the *Mohel* case. I didn't hear about that until this morning. I'm not quite sure what that court had in mind, and there is nothing in the Eleventh Circuit law that has anything like that. This is almost like a civil trial and you are giving them a series

of questions to answer, like a mathematical equation, if this, then this, this, then this. And that's not what a criminal trial is, Judge. And this is not an unconditional stipulation that he possessed requisite intent in this case. It simply doesn't exist.

So intent is not removed as an issue in this case. The stipulation would have to remove intent before the jury made any other decisions. I mean, we started off with a stipulation right there at the beginning. We stipulated to testimony. Both sides agree that this is what somebody would say. Stipulation is unconditional. It's not based on some other condition precedent occurring before the stipulation comes into effect. And I don't know any Eleventh Circuit case that deals with this type of conditional stipulation.

Mr. Herbison did correctly cite, I think it was, the *Costa* case, but that does not talk in terms of conditional stipulations as is what is offered by the defense here.

I would say also that Mr. Herbison has confused strength of the case with sufficiency of the case in the earlier argument that he made. There was clearly sufficient [p. 17] cases to go before the jury because at least some part of that jury believed that this defendant either was guilty or that he was not guilty. That's what a hung jury is. The strength of the case is different, though. When you separate those two out, it's the strength of the case, of the cases the Eleventh Circuit looked at in determining whether or not it was 404(b) evidence – or whether or not 404(b) evidence ought to be admitted.

Clearly, the strength of the case against Eric Parker in our trial in May, I guess it was, was not overwhelming.

And that's – that's the language the cases use, overwhelming strength of the case. It wasn't overwhelming in May, we had a hung jury. If it had been overwhelming, we would have had a guilty verdict and we wouldn't be here right now. So I think there is confusion, Judge. I would also offer, there are other reasons why – why this is – these different 404(b) factual scenarios should be admitted. And I have laid them out in the first paragraph of my response. As the – has the court received my response?

THE COURT: I think so. Yes.

MR. KIRWIN: I laid them out in the response. But specifically with regard to the Memphis case, which I – I was not dealing with in that response, the Memphis case, because of the – the very similar nature of the two crimes goes not only to show intent, but also to show identity. And, Judge, [p. 18] if the court recalls, that was where Parker, Defendant Parker was arrested in Memphis, and in giving his confession to his operation in Memphis talked about what he did, he procured cocaine in South Florida, he found females to act as couriers for that cocaine, they carried the cocaine with them on the planes, they flew from South Florida up to Memphis, they left the airport, they went to a motel and the cocaine was picked up from them in the motel. That's the type of – I don't like to use the word "fingerprint," but the heightened similarity, let's say, that goes for purposes of identity under 404(b). I don't offer these Texas ones for that and that's why I didn't include those in my motion. Those are good for intent. They also go for the plan of operation, the development of a course of conduct, his ability to execute such schemes, the absence of mistake,

any of the number of the reasons there. The strongest reason, of course, is intent. And I – I would suggest to the court that the conditional stipulation that has been made by the defense does not remove intent, cannot remove intent from an issue before this jury. If the court does find that, however, there are the other reasons why – why these factual scenarios are appropriate under 404(b) and should be admitted.

Additionally, Judge, without going back through the law, I set out the law as best I could in the Eleventh Circuit concerning the admissibility of 404(b) and we stand on those [p. 19] cases and ask the court to deny the motion in limine.

MR. HERBISON: May it please the court? If I could speak briefly to that?

THE COURT: Yes, sir.

MR. HERBISON: The court would recall at the first trial that a Tallahassee police officer was called to testify about how cocaine came into the Tallahassee area. And his testimony was that this is characteristic of how a great deal of controlled substance comes in. It's not probative of identity, unless one assumes that Eric Parker were the only person using this method to introduce cocaine into the Northern District of Florida. The testimony of the police officer is very much to the contrary.

Again, a matter of the government having it both ways, trying to have it both ways, trying to bring in a witness to say this is how it happens. Now, they are trying to say this is evidence of kind of a signature crime.

We submit it's not probative of identity and the evidence should not be admitted on that basis.

THE COURT: Well, it seems to me that this evidence from Houston, certainly the – relates to his prior dealing in drugs, and seems to me is – falls within the parameter of admissibility under 404(b) under current Eleventh Circuit law. I would think that those two incidents would be admissible as 404(b) evidence. [p. 20]

So the defendant's motion in limine –

(Pause)

– that's document 72, is denied, and the government will be permitted to place the two incidents in Texas, the one on – in '85 and '87, those will be admissible in their case in chief.

Tell me about this electronic pager. And that's Document 71. You have a motion in limine regarding this electronic pager, Mr. Herbison?

MR. KIRWIN: If I might? Ms. Lopez just arrived from Miami, she is our witness. If I can have five minutes to talk with Ms. Lopez about that, we switched her flights around because of the – because of the – when we thought the trial was going to be, so she got in this morning at 8:30. If I could have five or ten minutes to talk with her, the motion I don't think will be –

THE COURT: All right. I will do that in just a minute. You also have a motion in limine, Mr. Kirwin, on this.

MR. KIRWIN: Yes, sir, Judge, it's simply to request that the jury not be informed either through

questioning of any witness or through opening statement or argument that another jury has entered a verdict of not guilty as to Count II in this case. I think under – certainly under rule of [p. 21] evidence 403, I mean it's just –

THE COURT: You're not – nobody is going to make that argument, are you?

MR. HERBISON: Your Honor, if it were a conviction, the government would certainly be trying to use it. We submit that the acquittal is one factor bearing upon the jury's consideration of credibility of some of the government's witnesses. The fact that another group of 12 men and women good and true have essentially discredited a witness of the government that we expect they will be proffering before them again, it's one factor that the jury should be permitted to consider in evaluating the testimony of the government's witnesses.

The events of the November 1988 transaction, I don't know whether the government intends to refer to them or not. It's my understanding of the law that those events would be admissible, not to show the commission of that crime beyond a reasonable doubt, but would be admissible to establish an overt act in furtherance of the conspiracy occurring in the Northern District of Florida because the difference in the standard of proof, proof of an overt act which would need only rise to the preponderance of the evidence. We submit that basic fairness requires that a jury that would be permitted to consider a conviction to establish that kind of facts should be permitted to consider the effect of an acquittal as bearing [p. 22] upon the reliability of the government's proof and credibility of the

government's witnesses. It is one factor out of several which the jury just should be permitted to consider.

MR. KIRWIN: Judge, I – I can't imagine how I would introduce through a jury, oh, yeah, another jury convicted him on Count II of this thing, unless he took the stand and it was used for impeachment purposes, if in fact he had been ajudicated guilty of it or unless it came in under 404(b). I have no intent of eliciting any evidence or testimony concerning the November 1988 incident here in Tallahassee. It's the one that occurred at the Las Casas Motel.

THE COURT: You can carve that out of this trial?

MR. KIRWIN: Yes, sir. That's – that's totally distinct from this trial and there won't be any mention of it at any time during the course of the trial. So I mean I – and again, were it a conviction, it would not be just thrown up to a jury and say, oh, yeah, another jury convicted him of this. It would be impeachment purposes with a prior conviction, or it would be 404(b), but – and that would not bring it to their attention that a jury had convicted him, but rather a fact.

THE COURT: On the government – do you have anything further?

MR. HERBISON: Just reiterate that we submit that it is probative of what weight the jury should give the testimony [p. 23] of the government's witnesses.

THE COURT: Well, I think the government's assurance that this will not be interjected in this case in any fashion, the fact that it really wouldn't be admissible

at all unless – if it were a conviction, according to you, it would be admissible, but it would be admissible if he took the stand and was used as impeachment. So, it seems to me that it's not coming into this case, the events of that or the decision on it, whether it would have been guilty or not guilty. So I am granting the government's motion in limine to Document 73.

Excuse me.

Now, on the other hand, this one regarding this electronic pager, do we have any other matters we need to take up before we get this jury in here this afternoon?

MR. HERBISON: May it please the court?

With regard to the proposed testimony of Shirelle Merit that we just learned of recently, and I apologize for not reducing this to writing.

THE COURT: Yes, sir.

MR. HERBISON: But we would request that the court hold an in limine hearing as to whether the activities of Ms. Merit were in furtherance of the conspiracy alleged in the indictment, in which case would come in as substantive evidence, or whether the activities of Ms. Merit were in furtherance of some other agreement, in which case it would [p. 24] have to survive the scrutiny under 404(b). We request that the court at some point make a determination of that under Rule 104 as a preliminary question of fact. Goes to whether we are entitled to a limiting instruction on it or not.

THE COURT: Okay. Mr. Kirwin?

MR. KIRWIN: Judge, I –

THE COURT: Can you tell me – can you tell us for the record what Ms. Merit is going to say?

MR. KIRWIN: Yes, sir.

THE COURT: All right. Give me your proffer. I think that's – that will do it.

MR. KIRWIN: Okay. The proffer of her testimony would be that she was introduced to Eric Parker or E, as she knows him, by Katrina Lymon. Katrina Lymon talked –

THE COURT: Do we have a date on this?

MR. KIRWIN: It would have been in November or December of 1988, either.

(Discussion off the record)

MR. KIRWIN: Right.

(Discussion off the record)

MR. KIRWIN: She actually made her delivery two days before Katrina Lymon was arrested in Atlanta, so that would have been like December 7th of 1988. She was introduced to him.

THE COURT: Merit met –

[p. 25] MR. KIRWIN: Parker.

THE COURT: Parker in Atlanta.

MR. KIRWIN: No, I'm sorry, Judge. Let me start over.

THE COURT: Okay.

MR. KIRWIN: Merit met Parker in Miami through Katrina Lymon. She is a friend of Katrina Lymon. Katrina Lymon is the one who brought her up, told her that she was – she had and was delivering controlled substances for Eric Parker. Katrina Lymon then introduced her to Eric Parker. Eric Parker gave Shirelle Merit cocaine, put her in a car with some other people, they drove up to Charleston. When they got to Charleston she notified, I think, Katrina Lymon. I'm a little hazy on that detail, whether it was Katrina Lymon or Parker that she notified. Shortly thereafter a person that was introduced to her as Parker's brother came to her motel, took her to his dwelling, removed the cocaine that E had put in her baggage, paid her, I think it's 1300 or $1500, Judge, had his wife take her out shopping or something like that, dropped her back off at the airport and she flew back to Miami. She arrived in Miami, I believe, two days before Katrina Lymon was arrested, which was December the 9th of 1988. She stayed only one day in Charleston, South Carolina, and then –

THE COURT: Parker gave her the drugs?

[p. 26] MR. KIRWIN: Yes, sir.

THE COURT: She rode with some people that she met through him to Charleston, delivered the drugs to somebody up there and flew back to Miami?

MR. KIRWIN: Right.

THE COURT: And that's the essence?

MR. KIRWIN: That's it, sir.

THE COURT: And that took place in December of '88, '87?

MR. KIRWIN: December of '88.

THE COURT: All right. Okay. Now, you have it.

MR. HERBISON: Your Honor, the government has proffered no nexus between that transaction and the Northern District of Florida. In this context, the way the government has framed the indictment becomes significant. They have not alleged a conspiracy to distribute cocaine in the Northern District of Florida and elsewhere. They have alleged that in the Northern District of Florida and elsewhere the defendant, Mr. Parker and certain other people combined, conspired, confederated, et cetera, to deliver cocaine.

This court, of course, does not have venue or even jurisdiction to try a conspiracy not connected to the Northern District of Florida. The government has proffered no nexus between Ms. Merit's activities and this district. If it's admissible at all, it would be, we submit, 404(b) evidence and [p. 27] not substantive evidence as something in furtherance of the conspiracy alleged in this indictment. We should be entitled to a limiting instruction, the jury instructed not to consider that as evidence of the crime alleged in the indictment.

(Discussion off the record)

MR. HERBISON: Otherwise it would just permit naked forum shopping by the government.

(Pause)

THE COURT: Tell me about this – this venue argument that you have, now. I'm – I'm – I'm – I'm reading the indictment, the conspiracy count.

MR. HERBISON: Your Honor, if Ms. Merit were delivering this dope in furtherance of an agreement that did not encompass this district, and the government suggested nothing to suggest that's not the case, then her activities should not be considered as substantive evidence of the conspiracy alleged in this indictment. If it's in furtherance of a separate agreement, it's 404(b) evidence, rather than substantive evidence of what we have at issue before us. This court can't try a conspiracy unless an overt act in furtherance of the particular conspiracy is shown to have occurred in this district.

THE COURT: Well, I'm not so sure under Title 21 about overt acts. And even under the general conspiracy statute, not all of the overt acts have to take place in the [p. 28] jurisdiction.

MR. HERBISON: Not all of them, but at least one of them has to.

THE COURT: At least one of them has to take place. And I think we have lots of activity in the Northern District, don't we?

MR. KIRWIN: Yes, sir.

THE COURT: Let me ask the government, are you offering this as substantive evidence or 404(b)?

MR. KIRWIN: Offering it as substantive evidence as an overt act of the conspiracy. As an overt act of the conspiracy, Judge. I mean, I think the law is clear, and again, I didn't brief this, I wasn't aware this was – this was going to be heard today. But the law is clear that not all overt acts of the conspiracy need to take place in the jurisdiction where the conspiracy is tried. There are a

thousand cases out about – on that. But we have a lot of activity here in the Northern District. We have a delivery here in the Northern District of Florida. We have got phone tolls here in the Northern District of Florida.

THE COURT: Is it the government's position that this conspiracy, the one charged in Count I of this indictment, involved not only distribution of cocaine into this district, but to Charleston and to – and to, maybe, Texas, the Houston area?

[p. 29] MR. KIRWIN: Well, I mean – yes, Judge. I mean there were distributions. This conspiracy was a widespread distribution, was a widespread conspiracy. And the overt acts of – of this conspiracy included, I would suggest, this act in Charleston.

THE COURT: But –

MR. KIRWIN: The nexus, Judge, that I – that I look at to – to tie this to this particular conspiracy is the – the very small cast of characters that are involved in – in the incident that we are talking about. Katrina Lymon made a delivery here to the Northern District of Florida, that was her role in this conspiracy. She introduces Shirelle Merit to Eric Parker who is the source of the cocaine that comes – that comes here.

THE COURT: I think I understand that.

MR. KIRWIN: And Shirelle Merit makes another delivery for Eric Parker to another area.

THE COURT: And I'm not sure I heard the answer to my question. Maybe you gave it to me and I wasn't listening.

MR. KIRWIN: I'm sorry.

THE COURT: The indictment charges in Count I, which contains the catch-all language, says in the Northern District – in the Northern District of Florida and elsewhere. Does that elsewhere include Charleston, South Carolina?

MR. KIRWIN: Yes, sir.

[p. 30] THE COURT: And is that going to be your position with this – with this jury, that this is a conspiracy that not only brought drugs into the Northern District of Florida but took them elsewhere, to Charleston, to Houston, Texas, or not?

MR. KIRWIN: Certain –

THE COURT: I think you said Houston was 404(b) evidence.

MR. KIRWIN: Yes, sir, that's 404(b).

THE COURT: Of course it happened before, before the beginning date of this conspiracy, may be 404(b), anyway.

MR. KIRWIN: But that would be my position concerning the delivery by Shirelle Merit to Charleston.

THE COURT: Okay.

MR. HERBISON: Could I ask Your Honor to inquire of the government whether they contend this conspiracy also included delivery to Memphis?

MR. KIRWIN: We do not contend that, Judge.

THE COURT: Okay.

MR. HERBISON: In that case, Your Honor, we submit the government needs to proffer some evidence that Charleston was indeed within the scope of the agreement between Mr. Parker, Ms. Lymon and Mr. Gray alleged in this indictment. Got temporal proximity, that's all they have, and we submit that is simply not sufficient to conclude that this activity [p. 31] in Charleston was not in furtherance of some separate agreement. The reason I mentioned Memphis was that Mr. Parker has already been tried and convicted of a conspiracy involving distribution in Memphis, and if it's the government's position that there is one large ongoing conspiracy, then we shouldn't be here because of double jeopardy reasons.

THE COURT: Well, the Memphis – tell me – refresh me a little bit. At the first trial the Memphis testimony came in as 404(b).

MR. KIRWIN: That's correct, sir.

THE COURT: And that would still be your position on that?

MR. KIRWIN: Yes, sir.

THE COURT: That he was running an operation up there?

MR. KIRWIN: Yes, sir.

THE COURT: And he also had the one – what was – what was the time frame in Memphis?

MR. KIRWIN: Memphis took place subsequent to Tallahassee, later.

MR. MASSEY: They – but, Your Honor.

THE COURT: Later?

MR. HERBISON: Your Honor, the proof.

THE COURT: Wait, now. Just one apostle on each side of the River Jordan.

[p. 32] Now, what?

MR. HERBISON: Your Honor, the proof at the Memphis trial, it involved the same time frame. The arrest in Memphis didn't already occur until the indictment in Florida, but the proof in this case had been ongoing and the statements of Mr. Parker that were admitted into evidence in the Memphis trial refers to the same time frame as what we would have at issue in this trial.

THE COURT: Well, the time frame could be – could be the same and you could have operations going – in fact, I think we even have a multiple conspiracy charge that we give oftentimes at the request of defense counsel.

Well, I think the government ought to be allowed to put in this evidence concerning Shirelle Merit. It seems to me right now that it sounds like it's substantive evidence of the – of Count I, conspiracy. It's in the time frame. It's the government's position that you have the same cast of characters, and – and the word "elsewhere" includes Charleston, South Carolina. So I am going to receive that evidence in the case.

Of course, if it – if it turns out that it's 404(b), I can just give a cautionary instruction, because it certainly sounds, in any event, probative of an issue in this case, and that is the defendant's intent. If not proof of the conspiracy in this case, it certainly is proof of the [p. 33]

defendant's intent. But it sounds at this point more like proof of this conspiracy, rather than 404(b).

All right. Is there anything else? I know you need to talk to your witness.

Is there anything else over here?

Let me just explain to you, I don't care who does what in this case. I have admitted you all to try this case, but we do have a rule that, you know, just one – one attorney handles a segment of the trial. In other words, if it's a – if it's an argument on the motion, I only want one lawyer on each side standing up. If it's witnesses, I expect only one lawyer on each side to handle the witness on direct and redirect, and on cross. So that just makes it a lot easier for the – I think for the jury to understand. We don't get the jack-in-the-box gamesmanship going on.

Get some three-by-five cards if you have to send notes to each other to remind you. That's what I do up here. And you don't have to tear sheets of yellow tablet paper out every time you need to send your colleague a note.

Anyway, why don't we take a few minutes off the bench and you let me know when you are ready to come back, and we will bring up anything else that needs to be discussed.

(Recess from 10:04 a.m. to 10:23 a.m.)

THE COURT: Be seated.

All right, Mr. Kirwin, what do you have on this?

APPENDIX F

[p. 172] Q And how much did he pay you?

A It's close to a thousand.

Q What did you do after you got paid?

A I went shopping.

Q Okay. Who did you go shopping with?

A His girlfriend.

Q All right. And how long did you stay in Charleston, South Carolina?

A About four hours after that.

Q About –

A Four hours after that.

Q About four hours after you went shopping?

A Yeah.

Q How did you get home?

A Plane.

Q Did you ever deliver any cocaine for him again?

A No.

Q When you met E at Katrina's apartment, how long was he in the room?

A About ten, 15 minutes.

Q He told you he was E?

A Yeah.

Q Do you think you would recognize him if you say him?

A (Nodded negatively) No. I don't know.

Q Now, you were first contacted by Agent Ayoob last week, is

* * *